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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1331

CITY OF PHILADELPHIA, *et al.*, *Petitioners*,

v.

GEORGE F. BAKER, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, City of Philadelphia, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, and United Transportation Union, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on January 22, 1975.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reported as *City of Philadelphia v. Baker*, 508 F.2d 283, and is reproduced in Appendix A hereto (App. 1a-14a). A related opinion of the Court of Appeals, arising out of the same district court decision is not reported, but is reproduced in Appendix B (App. 15a-16a).

The two decisions of the U.S. District Court for the Eastern District of Pennsylvania are entitled "Discontinuance of Intercity Passenger Service". The first opinion was rendered April 30, 1971, referring certain matters to the Interstate Commerce Commission, and is reported as *In Re Penn Central Transportation Company*, 329 F. Supp. 572, reproduced in Appendix C (App. 19a-23a). The second opinion was rendered January 22, 1974, upon referral back from the Interstate Commerce Commission, and is reported as *In Re Penn Central Transportation Company*, 370 F. Supp. 22, reproduced in Appendix D (App. 24a-33a).

The decision of the Interstate Commerce Commission, finding 17 so-called "600-series" passenger trains operating between Philadelphia and Harrisburg, Pa. to be "commuter and other short-haul service", was rendered June 24, 1971, and is reported as *Penn Central Transp. Co.–Status of Passenger Serv.*, 338 I.C.C. 621, reproduced in Appendix E (App. 34a-72a).

The decision of the Interstate Commerce Commission, finding 27 so-called "200-series" passenger trains operating between Philadelphia, Pa. and New York, N.Y. to be "commuter and other short-haul service", was rendered July 26, 1971, and is reported as *Penn Central Transp. Co.–Status of Passenger Serv.*, 338 I.C.C. 690, reproduced in Appendix F (App. 73a-96a).

JURISDICTION

The judgment of the U.S. Court of Appeals was entered January 22, 1975 (App. 11a-14a). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1), 2101(c).

QUESTIONS PRESENTED

1. Whether the mere identification of a train by the U.S. Secretary of Transportation on January 28, 1971, as being in operation on a portion of an intercity route, but not designating such train for continued operation as part of the basic system, nevertheless acts with finality to determine the character of the train service as "intercity" with immunity from judicial review.

2. Whether persons other than the U.S. Attorney General may seek a declaration that certain Penn Central trains provide "commuter" service, and if so, enjoin the discontinuance thereof by Penn Central if in violation of State law, despite any operation for the account of Amtrak *pendente lite*.

STATUTES INVOLVED

The statutes principally involved are sections 102(4), 102(5), 201, and 202 of Rail Passenger Service Act. 45 U.S.C. 502(4), 502(5), 521 and 522:

> SEC. 102. DEFINITIONS.
>
> For the purposes of this Act–
>
> (4) "Basic System" means the system of intercity rail passenger service designated by the Secretary under title II and section 403(a) of this Act.
>
> (5) "Intercity rail passenger service" means all rail passenger service other than commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations.

TITLE II – BASIC NATIONAL RAIL PASSENGER SYSTEM

SEC. 201. DESIGNATION OF SYSTEM.

In carrying out the congressional findings and declaration of purpose set forth in title I of this Act, the Secretary, acting in cooperation with other interested Federal agencies and departments, is authorized and directed to submit to the Commission and to the Congress within thirty days after the date of enactment of this Act his preliminary report and recommendations for the basic system. Such recommendations shall specify those points between which intercity passenger trains shall be operated, identify all routes over which service may be provided, and the trains presently operated over such routes, together with basic service characteristics of operations to be provided within the basic system, taking into account schedules, number of trains, connections, through car service, and sleeping, parlor, dining, and lounge facilities. In recommending the basic system the Secretary shall take into account the need for expeditious intercity rail passenger service within and between all regions of the continental United States, and the Secretary shall consider the need for such service within the States of Alaska and Hawaii and the Commonwealth of Puerto Rico. In formulating such recommendations, the Secretary shall consider opportunities for provision of faster service, more convenient service, service to more centers of population, and service at lower cost, by the joint operation, for passenger service of facilities of two or more railroad companies; the importance of a given service to overall viability of the basic system; adequacy of other transportation facilities serving the same points; unique characteristics and advantages of rail service as compared to other modes of transportation;

the relationship of public benefits of given services to the costs of providing such services; and potential profitability of the service. The exclusion of a particular route, train, or service from the basic system shall not be deemed to create a presumption that the route, train, or service is not required by public convenience and necessity in any proceeding under section 13a of the Interstate Commerce Act (49 U.S.C. 13a).

SEC. 202. REVIEW OF THE BASIC SYSTEM.

The Commission, the State Commission, the representatives of the railroads, and labor organizations duly authorized under the Railway Labor Act to represent railroad employees shall, within thirty days after receipt of the preliminary report of the Secretary designating the basic system, review such report consistent with the purposes of this Act and provide the Secretary with their comments and recommendations in writing. The Secretary shall give due consideration to such comments and recommendations. The Secretary shall, within ninety days after the date of enactment of this Act, submit his final report designating the basic system to the Congress. Such final report shall include a summary of their recommendations together with his reasons for failing to adopt any such recommendation. The basic system as designated by the Secretary shall become effective for the purposes of this Act upon the date that the final report of the Secretary is submitted to Congress and shall not be reviewable in any court.

STATEMENT

This is an action to determine the status of certain passenger train service, and thereafter to enjoin the discontinuance by Penn Central Transportation Company (Penn

Central) of its responsibility for the involved 44 passenger trains, on the ground that the service provided is "commuter or other short-haul service" and not "intercity rail passenger service", within the meaning of section 102(5) of Rail Passenger Service Act, 45 U.S.C. 502(5). Of the 44 trains, 17 are so-called "600-series" trains operating between Philadelphia and Harrisburg, Pa., whereas the remaining 27 are the so-called "200-series" trains operating between Philadelphia, Pa. and New York, N.Y.

The Court of Appeals denied all relief. The status of the trains as commuter or intercity was ruled non-reviewable on the ground that the 200-series and 600-series trains were mentioned in the final report issued January 28, 1971, by U.S. Secretary of Transportation John A. Volpe, and thus "designated" as part of the "basic system." Section 202 of the Amtrak Act provides that the basic system as designated by the Secretary shall not be reviewable in any court (App. 8-9).

The Rail Passenger Service Act (Amtrak Act) was enacted October 30, 1970. Penn Central elected to contract with Amtrak,[1] and Penn Central thereupon posted notices on March 31, 1971, pursuant to section 401(a)(1) of the Amtrak Act, 45 U.S.C. 561(a)(1), that it would discontinue its responsibility for named trains on May 1, 1971, including the 200-series and 600-series trains.

Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, City of Philadelphia, and United Transportation Union, Petitioners herein, challenged the discontinuance as in violation of State law, on the ground that

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[1] Sec. 329 F. Supp. 477.

the trains were "commuter or other short-haul service", and not "intercity rail passenger service," so that prior approval by the Public Utility Commission and/or the Interstate Commerce Commission (I.C.C.) is required. Suit for injunctive relief was filed April 7, 1971, in the Commonwealth Court at Harrisburg, Pa.

Petitioners thereupon were enjoined from litigating this matter in any court other than the district court overseeing the Penn Central reorganization. *In Re Penn Central Transportation Company*, 329 F. Supp. 387 (E.D. Pa. 1970), aff'd 446 F.2d 1109 (3rd Cir.), cert. den. 405 U.S. 918.

On April 30, 1971, the district court referred the status of the 200-series and 600-series trains to the I.C.C., noting a need that uniform standards be applied in determining whether or not a train is intercity, and that the categorization of train service in this context "is obviously a matter within the expertise of the Commission." 329 F. Supp. at 577 (App. 22a). The district court also observed that the 200-series and 600-series trains were not included in the so-called "basic system", but "were added after the basic system was established". 329 F. Supp. at 577 (App. 22a). Pending the referral, Penn Central was to operate the trains for the account of Amtrak pursuant to contract. In the event Amtrak opted to discontinue the trains, *pendente lite*, the trains by court order would continue as Penn Central trains.

The I.C.C. held extensive hearing. The agency concluded that the 600-series and 200-series trains were "commuter or other short-haul service", thus upholding the contentions of

Pennsylvania interests.[2] 338 I.C.C. 621 (App. 34a) and 338 I.C.C. 690 (App. 73a).

Upon return of the case from the I.C.C. back to the district court, Amtrak resisted implementation of the I.C.C. decisions. The district court dismissed the matter and declined to consider whether the I.C.C. had jurisdiction to characterize the trains as commuter or intercity, or whether such characterization was correct. The court analogized from *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), that if only the U.S. Attorney General may sue to prevent Amtrak from discontinuing a train, no one but the Attorney General should be allowed to sue to compel Amtrak to surrender a particular service. 370 F. Supp. at 26-28. (App. 26a-28a).

However, the Court of Appeals expressly did not rely upon the opinion in *Passenger Corp. v. Passengers Assn., supra.*[3] Rather, the court affirmed the district court on the theory that the 200-series and 600-series trains were "designated" in the "final report" of the U.S. Secretary of Transportation on the "basic system", and by the terms

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[2] Although no longer relevant to this proceeding, the I.C.C. also found certain bus service between York and Lancaster, Pa. not to constitute intercity rail passenger service, but that certain other rail service in New Jersey was intercity, 338 I.C.C. at 639-41 (App. 52a-54a) and 338 I.C.C. at 702-3 (App. 85a-86a). In addition, certain rail service between Chatham and New York, N.Y. was ruled intercity, 338 I.C.C. 660. See: *In Re Penn Central Transportation Company*, 457 F. 381 (3rd Cir. 1972).

[3] The Court of Appeals, in another decision, *Davis v. Romney*, 490 F.2d 1360, 1369 (3rd Cir. 1974), has construed the Supreme Court's opinion as confined to suits based on the Amtrak Act, and not – as here – to suits based upon other statutes.

of section 202 of the Amtrak Act, the basic system is not reviewable in any court.

REASONS FOR GRANTING THE WRIT

I. THE APPROPRIATE PERSON OR AGENCY TO DETERMINE THE COMMUTER CHARACTER OF A PASSENGER TRAIN IS AN IMPORTANT AND PRESSING FEDERAL QUESTION.

A. The Decision Below Conflicts with Rulings of this Court and in Two Circuits.

The Rail Passenger Service Act is directed only to "intercity rail passenger service." *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.*, 475 F.2d 325, 340-44 (D.C. Cir. 1973). Prior to May 1, 1971, the date railroads contracting with Amtrak were allowed to discontinue their responsibility for intercity rail passenger service by section 401(a)(1), 45 U.S.C. 561(a)(1), it was generally understood that there were about 360 intercity trains in existence throughout the nation. Amtrak's Chairman, David W. Kendall, testified before a Senate Subcommittee on April 6, 1971, that there were 360 intercity trains operated in 1970.[4] Secretary of Transportation John A. Volpe testified before a House Committee on April 22, 1971, that there were 366 trains in operation in 1970.[5] However, railroads contracting with Amtrak posted a total of 527 so-called intercity trains for discontinuance on May 1, 1971.

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[4] Hearings on *Second Supplemental Appropriations for Fiscal Year 1971*, U.S. Senate Subcommittee of the Committee on Appropriations, 203 (1971).

[5] Hearings on H.R. 709, *Review and Refunding of Rail Passenger Service Act*, before U.S. House Subcommittee on Transportation & Aeronautics, Ser. No. 92-53, at pp. 149-244 (1971).

A number of proceedings were commenced that challenged the inclusion of "commuter" trains in the intercity notices. Commuter service is vital to urban transportation. Such service is particularly important to Boston, New York, Philadelphia, Harrisburg, Baltimore, Washington, Chicago and San Francisco, among others.

The importance to Pennsylvania and to Philadelphia that a service be characterized as "commuter" does not relate merely to discontinuance of trains. Of considerable importance is Amtrak's immunity from all State or federal fare regulation, by virtue of section 306 of the Amtrak law, 45 U.S.C. 546. For example, Amtrak has raised the fares on its 600-series and 200-series trains to levels we consider outrageous. The fares have been increased much greater than for trains operated solely by Penn Central, and also increased to a greater extent than for other Amtrak service operating on other routes.

The resolution of the intercity-commuter question has generally been made by the institution of a court proceeding, followed by a referral to the I.C.C. This pattern commenced with the decision of the U.S. Supreme Corut early in 1971 in *United States v. Chicago & E.I.R. Co.*, 400 U.S. 987, where the court decided that the Interstate Commerce Commission would be the forum for a determination whether a train constitutes an "intercity" service, and was prompted by a joint memorandum from the Solicitor General and the Interstate Commerce Commission.

The district court in the instant proceeding cited the *Chicago & E.I.R. Co.* case in referral of the present controversy to the I.C.C. 329 F. Supp. at 577 (App. 22a).

The decision of the Court of Appeals, below, changes the rule. Unless reversed, the character of the train service is determined if the train service was listed in the January 28, 1971 report of the U.S. Secretary of Transportation. Neither the I.C.C. nor a court could make a different determination.

The decision below upsets what has heretofore thought to be settled practice.

1. *Seventh Circuit.* A three-judge district court reviewed the I.C.C.'s determination that the service of the "Danville Flyer," operating between Chicago and Danville, Ill., was intercity. *Illinois Commerce Commission v. United States,* 346 F. Supp. 910 (S.D. Ill. 1972). A three-judge court in another district reviewed the agency's ruling that the "Kate Shelley", operating between Clinton, Ia. and Chicago, Ill., was intercity. *People of the State of Illinois v. United States,* 371 F. Supp. 1136 (N.D. Ill. 1973).

2. *D.C. Circuit.* The Court of Appeals for the D.C. Circuit ruled that the intercity-commuter character of a train is reviewable, but intimated no views as to the propriety of referral to the I.C.C. or the validity of the I.C.C.'s standards. *Potomac Passengers Ass'n v. Chesapeake & Ohio Ry. Co.,* 475 F.2d 325, 340-44 (1973). A district court in the District of Columbia has reviewed a referral to the I.C.C. on the intercity-commuter issue. *Potomac Passengers Ass'n v. Chesapeake & Ohio R. Co.,* 363 F. Supp. 39 (1973).

B. The Decision Below Conflicts with the Policy of the I.C.C. as the Agency with Primary Jurisdiction and/or Expertise.

The decision below holds that the U.S. Secretary of Transportation has non-reviewable and exclusive authority to determine the character of a train service. This conflicts with the primary jurisdiction and/or expertise held by the Interstate Commerce Commission.

The I.C.C. early assumed the responsibility for making the intercity-commuter determination. Some of the leading reported decisions are as follows:

Boston, Mass.-Providence, R.I. *Penn Central Transp. Co. Discon. or Change in Serv.*, 338 I.C.C. 318 (1971).

Chicago-Danville, Ill. *Chicago & E.I.R. Co. Discontinuance of Trains*, 338 I.C.C. 714 (1971).

Chicago, Ill.-Milwaukee, Wis. *Illinois v. Chicago & N.W. Transp. Co.*, 347 I.C.C. 362 (1974).

Chicago, Ill.-South Bend, Ind. *Chicago S.S. & S.B.R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 179-80 (1972).

Baltimore, Md.-Washington, D.C. and Cumberland, Md.-Washington, D.C. *Kennedy v. Baltimore & O.R. Co.*, 342 I.C.C. 19 (1972) and 342 I.C.C. 778 (1973).

Chaltham-New York, N.Y. *Penn Central Transp. Co.–Status of Passenger Serv.*, 338 I.C.C. 660 (1971).

Philadelphia-Harrisburg, Pa. *Appendix E*, 338 I.C.C. 621 (App. 32a).

Philadelphia, Pa.-New York, N.Y. *Appendix F*, 338 I.C.C. 690 (App. 71a).

II. THE COURT OF APPEALS ERRONEOUSLY CONSTRUED THE "BASIC SYSTEM" OF INTERCITY SERVICE

The Court of Appeals determined that Penn Central's decision to discontinue the 200-series and 600-series trains, and Amtrak's decision to operate the service, were beyond judicial review, owing to section 202 of the Amtrak Act, 45 U.S.C. 522 (App. 8a-9a).

This is an erroneous construction. The 200-series and 600-series trains are not part of the basic system, as even the district court recognized. 329 F. Supp. at 577 (App. 22a).

Section 201 provides that the U.S. Secretary of Transportation shall prepare a preliminary report and recommendations for the basic system of intercity rail passenger service. The recommendations shall –

1. Specify those points between which intercity passenger trains shall be operated –
2. identify all routes over which service may be provided, and the trains presently operated over such routes –
3. together with basic service characteristics of operations to be provided within the basic system –

Section 202 provides that after public comments are submitted regarding the preliminary report and recommendations, the Secretary of Transportation shall submit a final report *designating* the *basic system.* The basic system

as designated shall become effective on the date the final report is submitted to Congress and shall not be reviewable in any court.

The "basic system" is defined by section 102(4) as, "the system of intercity rail passenger service designated by the Secretary under Title II (sections 201 and 202) and section 403(a).

Section 403 is entitled, "New Service". Section 403(a) provides as pertinent:

> (a) the Corporation may provide intercity rail passenger service in excess of that prescribed for the basic system, either within or outside the basic system, including the operation of special and extra passenger trains, if consistent with prudent management. Any intercity rail passenger service provided under this subsection for a continuous period of two years shall be designated by the Secretary as a part of the basic system.

Other provisions bearing upon the basic system include section 404(b)(1) and 404(b)(2):

> (b)(1) The Corporation must provide the service included within the basic system until July 1, 1975, to the extent it has assumed responsibility for such service by contract with a railroad pursuant to section 401 of this Act.
>
> (b)(2) Except as otherwise provided in this paragraph and in section 403(a) of this Act, service beyond that prescribed for the basic system undertaken by the Corporation on its own initiative may be discontinued at any time.

> No such service undertaken by the Corporation on or after January 1, 1973 shall be discontinued until July 1, 1975.

The references to the "basic system" mean the service required to be maintained by Amtrak.

The final report of the secretary of Transportation did not "designate" or "prescribe" the 200-series or 600-series trains for inclusion in the basic system.[6] The service embraced within the "basic system" consists of operation between 21 city-pairs, with a level of service to be at least one daily train in each direction – a total of 42 trains – unless patronage and other factors indicate that daily frequency is warranted.

The fact that the 200-series and 600-series trains were not designated for the basic system was found by the district court as a matter of fact. 329 F. Supp. at 577 (App. 22a). New York-Philadelphia and Harrisburg-Philadelphia are not specified in the final report as points between which intercity rail service shall be operated.

The mere listing of a train as being operated on a portion of a possible route for the basic system does not make the train an "intercity" train. To hold otherwise, as did the Court of Appeals, would create absurd results, such as:

1. If the listing of a train in the final report acted to designated the train as part of the basic system, very few

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[6] The Final Report on Basic National Rail Passenger Service is reproduced in Hearings on *Administration's Request for Additional Funding for Amtrak*, before Subcommittee on Surface Transportation of U.S. Senate Committee on Commerce, Ser. No. 92-29, 167-267 (1971).

trains would have been discontinued on May 1, 1971, because trains designated in the basic system must be operated until July 1, 1973, and now until July 1, 1975, by section 404(b) of the Act.

2. A number of intercity trains were not listed in the final report. For example, the Chatham trains are not shown in the final report. The Court of Appeals wrote a separate opinion for the Chatham appeal, even though the subject of the same referral and final opinions of the district court (App. 15a-18a).

3. Some trains listed in the final report are clearly commuter trains. For example the electric service of the Chicago, South Shore & South Bend Railroad between Chicago, Ill. and South Bend, Ind. were shown in the final report as train service on part of a route between Chicago, Ill. and New York, N.Y., points between which intercity service shall be provided, yet this service was ruled by the I.C.C., without objection, to be commuter service. *Chicago S.S. & S.B.R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 179-80 (1972). Under the court's theory, a number of electric trains thus were improperly discontinued in 1972, and should be restored to service.

III. THESE PENNSYLVANIA INTERESTS HAVE STANDING TO SUE

The Court of Appeals found it unnecessary to decide whether the recent decision of this Court in *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), operated to bar the action, inasmuch as the Court of Appeals ruled that the trains were designated as part of the basic system, and their character immune from review by anyone (App. 10a).

However, the district court ruled that no one but the U.S. Attorney General could sue to challenge the character of the trains if Amtrak elected to operate the trains upon discontinuance by Penn Central. 370 F. Supp. at 27-28. (App. 27a-28a). The district court attempted an analogy with the decision in *Passenger Corp. v. Passengers Assn., supra,* that if no one but the Attorney General could prevent Amtrak from discontinuing a train, then no one but the Attorney General can sue to compel Amtrak to surrender a particular service. 370 F. Supp. at 28 (App. 28a).

The district court erroneously misconstrued the opinion in *Passenger Corp. v. Passengers Assn., supra.* The Supreme Court made it clear that its decision is restricted to situations where the cause of action is founded upon the Amtrak Act rather than, as here, State laws. 414 U.S. at 454-55:

> The gravamen of the respondent's complaint was that these discontinuances are not authorized by, and in fact are prohibited by, the Amtrak Act."

The immunity of section 307(a) of the Amtrak Act only extends to duties and obligations imposed by the Amtrak Act. 414 U.S. at 464-65:

> For these reasons we hold that Section 307(a) provides the exclusive remedies for breaches of any duties or obligations imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred.

The Court of Appeals for the Third Circuit subsequently construed the decision in *Passenger Corp. v. Passengers*

Assn., *supra*, to only involve causes of action founded upon the Amtrak Act and not upon other statutes. *Davis v. Romney*, 490 F.2d 1360, 1369 (3rd Cir. 1974).

Finally, we point out that the distinctions made by the district court in its final opinion, between a Penn Central discontinuance followed by an Amtrak continuance, on the one hand, and a Penn Central discontinuance not followed by an Amtrak continuance, on the other hand, is contrary to the earlier opinion of the same court that no such distinction can be made under the Amtrak Act (App. 20a, 27a-28a).

The decision of this Court in *Passenger Corp. v. Passengers Assn.* does not apply to this action, which is founded upon a violation of State law by Penn Central.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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April, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1301

CITY OF PHILADELPHIA, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION and UNITED TRANSPORTATION UNION, STATE OF NEW JERSEY, DEPARTMENT OF TRANSPORTATION

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, and NATIONAL RAILROAD PASSENGER CORPORATION

CITY OF PHILADELPHIA, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, UNITED TRANSPORTATION UNION, and STATE OF NEW JERSEY, Appellants

(D. C. Civil No. 71-1002)

No. 74-1302

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION and UNITED TRANSPORTATION UNION, STATE OF NEW JERSEY DEPT. OF TRANSPORTATION

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CEN-

TRAL TRANSPORTATION COMPANY, DEBTOR, NATIONAL RAILROAD PASSENGER CORPORATION, and UNITED STATES OF AMERICA

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, STATE OF NEW JERSEY, and UNITED TRANSPORTATION UNION, Appellants

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(D. C. Civil No. 71-2301)

No. 74-1303

In the Matter of:

PENN CENTRAL TRANSPORTATION COMPANY, Debtor

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, CITY OF PHILADELPHIA, UNITED TRANSPORTATION UNION, STATE OF NEW JERSEY, STATE OF NEW YORK and T. W. PARKER, Appellants

---

(D. C. No. B-70-347 In Bankruptcy)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 21, 1974
Before ADAMS, GIBBONS and WEIS, *Circuit Judges*

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Robert E. J. Curran, United States Attorney
Morton Hollander
David J. Anderson
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OPINION OF THE COURT

(Filed January 22, 1975)

GIBBONS, *Circuit Judge*

These consolidated appeals are from three separate orders entered following the filing of the district court's opinion in *In re Penn Central Transportation Co.*, 370 F. Supp. 22 (E.D. Pa. 1974). Appeal No. 74-1301 is from an order entered in district court civil action No. 71-1002 denying plaintiffs' motion to convene a three-judge district court, and granting defendants' motion to dismiss the complaint. Appeal No. 74-1302 is from an order en-

tered in district court civil action No. 71-2301 also denying plaintiffs' motion to convene a three-judge district court and granting defendants' motion to dismiss the complaint. Appeal No. 74-1303 is from the entry of order No. 1447 in proceedings for the reorganization of Penn Central Transportation Co., which, as relevant to this appeal, dismissed applications to have the trustees in reorganization of Penn Central operate trains Nos. 600 through 617 (the 600 series), between Harrisburg and Philadelphia, Pennsylvania, and trains Nos. 200 through 298 (the 200 series) between Philadelphia, Pennsylvania and New York, New York.[1] The appellants are the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the United Transportation Union.[2] The appellees are the trustees in reorganization of Penn Central, the National Railroad Passenger Corporation, and the United States of America.

The complex procedural history of this litigation can, for present purposes, begin with order No. 232 entered on April 16, 1971. By that order the reorganization court enjoined all persons, including the appellants, from instituting or maintaining any litigation affecting the continuance or discontinuance of passenger trains covered by the National Rail Passenger Service Act of 1970 (the Amtrak statute), 45 U.S.C. § 501 *et seq.*, in any court other than the Eastern District of Pennsylvania.[3] Following the entry of this order the appellants filed district court civil action No. 71-1002 in the Eastern District of Pennsylvania seeking to enjoin termination of any service between Harrisburg and Philadelphia or between Philadelphia and New York. The complaint also specifically requested that the

1. A separate order growing out of the same opinion is before us in *Parker v. Penn Central Transportation Co.*, No. 74-1325 (filed Jan. 13, 1975).

2. On December 19, 1974 the State of New Jersey, originally an appellant, filed a stipulation of dismissal. The State of New York also appeals from order No. 1447 with respect to the Chatham, New York—New York, New York run. The gravamen of the claim is more fully considered in *Parker v. Penn Central Transportation Co.*, No. 74-1325 (3d Cir., filed Jan. 13, 1975).

3. *See In re Penn Central Transportation Co.*, 446 F.2d 1109 (3d Cir.), *aff'g*, 329 F. Supp. 387 (E.D. Pa. 1971) (Appeal of Congress of Ry. Unions).

question of whether the 600 series trains and the 200 series trains were in intercity or commuter service within the meaning of § 102(5) of the Amtrak statute be referred, pursuant to 28 U.S.C. § 1336(b), to the Interstate Commerce Commission. The district court by order No. 238 approved the contract between the debtor and Amtrak and by order No. 244 dated April 30, 1971 acceded to appellants' request that the intercity or commuter status of the 200 and 600 series trains be referred to the Commission.[4] By order No. 245 the reorganization court directed that intercity rail service be discontinued, but that pending the I.C.C. determination the trustees resume the operation of the 200 and 600 series trains if they should be discontinued by Amtrak.

The Commission undertook to investigate and report on both series. On June 24, 1971, in *Finance Docket No. 26632,* 338 I.C.C. 621 it found that the 600 series trains were not "intercity rail passenger service" within the meaning of § 102(5) of the Amtrak statute, 45 U.S.C. § 502(5), but were commuter trains. On July 26, 1971, in *Finance Docket No. 26634,* 338 I.C.C. 690 it found that the 200 series trains were not "intercity rail passenger service", but commuter trains. On July 14, 1971 the Commission was made a party to the reorganization proceedings with respect to hearings on exceptions to its reports.

Meanwhile, effective May 1, 1971, both series of trains were designated by the National Rail Passenger Corporation (Amtrak) as "Amtrak" trains. They have since that date been operated by Penn Central pursuant to a contract with Amtrak.

On August 11, 1972 the appellants petitioned in the reorganization proceeding for an order directing the trustees to resume operation of the 600 series trains. When it became clear that Amtrak was not about to terminate this service a hearing scheduled on that petition was cancelled without prejudice. Although the record is not en-

4. *In re Penn Central Transportation Co.,* 329 F. Supp. 572, 577 (E.D. Pa. 1971) (Discontinuance of Intercity Passenger Service).

tirely clear, it appears that other informal applications for relief with respect to the 600 and 200 series trains were also presented in the reorganization proceedings.

On September 22, 1971 the appellants filed district court civil action No. 71-2301 praying that the district court, pursuant to 28 U.S.C. § 1336(c), enforce the two ICC decisions and declare pursuant to 28 U.S.C. §§ 2201 and 2202 that Penn Central may not be relieved of the responsibility for the disputed service.

The defendants moved in both Nos. 71-1002 and 71-2301 to dismiss the complaints. And the plaintiffs, relying on 28 U.S.C. § 2325, moved for the convening of a three-judge court in both actions. Thus the district court had before it the defendants' motions to dismiss both civil actions, the plaintiffs' motions to convene a three-judge court, and certain applications in the reorganization proceedings all directed at obtaining or opposing an adjudication that the 600 series and 200 series trains were commuter trains falling outside the scope of the Amtrak statute. The court considered all these matters in a single opinion. *In re Penn Central Transportation Co.*, 370 F. Supp. 22 (E.D. Pa. 1974). It held, *inter alia* that:

(1) 28 U.S.C. § 2325 was inapplicable because the ICC reports on the 600 and 200 series trains were not "orders" within the meaning of that statute; (2) it had jurisdiction both by virtue of 28 U.S.C. §§ 1336(b), 1398(b), and under the Bankruptcy Act, and (3) by § 202 of the Amtrak statute, 45 U.S.C. § 522 Congress had precluded judicial review of the decision by Amtrak to operate the 600 and 200 series trains as intercity trains.

We affirm.

1. 28 U.S.C. § 2325 provides that an interlocutory or permanent injunction restraining the enforcement, operation or execution of an order of the ICC shall not be granted unless the application therefor is heard by a three-judge

district court. No order was entered in Finance Dockets Nos. 26632 or 26634. Thus § 2325 is inapplicable. *United States v. Atlanta, Birmingham & Coast R.R.*, 282 U.S. 522 (1931). Moreover, the appellants, plaintiffs in civil actions Nos. 71-1002 and 71-2301, sought to enforce rather than to enjoin enforcement of the ICC's conclusion that the disputed trains were commuter rather than intercity. Thus the district court properly declined to request the convening of a three-judge district court.

2. The basis for the district court's subject matter jurisdiction need not detain us. We have twice held that all litigation concerning the Penn Central's relationship with Amtrak should be heard in the Eastern District of Pennsylvania. *In re Penn Central Transportation Co.*, 457 F.2d 381, 387 (3d Cir. 1972) (Appeal of State of New York); *In re Penn Central Transportation Co.*, 446 F.2d 1109 (3d Cir. 1971) (Appeal of Congress of Ry. Unions).

3. The district court properly concluded that Amtrak's decision to operate, and Penn Central's decision to discontinue the 600 and 200 series trains were beyond judicial review. The congressional purpose in enacting the Amtrak statute was the creation of a modern, efficient intercity railroad passenger service system. Section 101 of the Amtrak statute, 45 U.S.C. § 501. The first step in creation of that system was to be a preliminary report by the Secretary of Transportation to the ICC and to Congress recommending a "basic system." Section 201 of the Amtrak statute, 45 U.S.C. § 521. The recommendation was to specify "points between which intercity passenger trains shall be operated . . . routes . . . and the trains presently operated over such routes, together with basic service characteristics of operations to be provided within the basic system, taking into account schedules, [and] number of trains. . . ." *Id.* Interested parties were afforded an opportunity to comment and make recommendations on

the preliminary report. Section 202 of the Amtrak statute, 45 U.S.C. § 522. The statute then provided:

> "The Secretary shall . . . submit his final report designating the basic system to Congress . . . . The basic system as designated by the Secretary shall become effective for the purposes of this chapter upon the dates that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court. Id.* (emphasis supplied).

The Secretary's final report was submitted on January 28, 1971. In that report he designated points between which intercity passenger trains would be operated, including "New York-Chicago." He designated routes over which service might be provided, including the "New York-Pittsburgh Segment via Philadelphia, Harrisburg." He designated trains presently operated over such routes in the New York-Pittsburgh segment via Philadelphia-Harrisburg, including in that designation the 600 series trains. He also designated New York and Washington as two points between which intercity passenger service trains "shall be operated" and designated routes over which that service "may be operated" as "New York-Washington Segment via-Newark, Trenton, Philadelphia, Wilmington, Baltimore." He listed the trains presently operating over the New York-Washington segment including in that list the 200 series trains.

There can be no doubt that Congress, having afforded interested parties an opportunity to comment and make recommendations on the Secretary's preliminary report, intended that the final report designating the basic system, a document culminating a process essentially legislative in nature, be subject to review only in the legislative branch. The statute could be no more explicit. *See Quincy College and Seminary Corp. v. Burlington Northern, Inc.*, 328 F. Supp. 808, 811 (N.D. Ill. 1971) *aff'd*, 405 U.S. 906 (1972).

The complaints in civil actions Nos. 71-1002 and 71-2301 were properly dismissed, and order No. 1447 in the reorganization proceeding was properly entered.[5]

The orders appealed from will be affirmed.

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5. This conclusion makes it unnecessary to consider appellees' additional contention that *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974), bars relief.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 74-1301

CITY OF PHILADELPHIA, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION and UNITED TRANSPORTATION UNION STATE OF NEW JERSEY, DEPARTMENT OF TRANSPORTATION

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, and NATIONAL RAILROAD PASSENGER CORPORATION

CITY OF PHILADELPHIA, COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, UNITED TRANSPORTATION UNION, and STATE OF NEW JERSEY,

Appellants

(D.C. Civil No. 71-1002)

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 74-1302

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION and UNITED TRANSPORTATION UNION, STATE OF NEW JERSEY DEPT. OF TRANSPORTATION

v.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. and WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, NATIONAL RAILROAD PASSENGER CORPORATION, and UNITED STATES OF AMERICA

COMMONWEALTH OF PENNSYLVANIA, CITY OF PHILADELPHIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, STATE OF NEW JERSEY, and UNITED TRANSPORTATION UNION,

Appellants

(D.C. Civil No. 70-2301)

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 74-1303

In the Matter of:

PENN CENTRAL TRANSPORTATION COMPANY,

Debtor

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, CITY OF OF PHILADELPHIA, UNITED TRANSPORTATION UNION, STATE OF NEW JERSEY, STATE OF NEW YORK and T. W. PARKER,

Appellants

(D.C. No. B-70-347 In Bankruptcy)

ON APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, GIBBONS and WEIS, *Circuit Judges*

J U D G M E N T

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court entered January 23, 1974 in E.D. Pa. Civil No. 71-1002, entered January 23, 1974 in E.D. Pa. Civil No. 71-2301 and Order No. 1447 in D.C. No. B-70-347 In Bankruptcy be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

January 22, 1975

Certified as a true copy and issued in lieu of a formal mandate on February 13, 1975.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee, U.S.A., as follows:

Brief $187.80

Costs taxed in favor of appellee, National Railroad Passenger Corp., as follows:

Brief $333.00

Costs taxed in favor of appellee, The Trustees of the Property of Penn Central Transportation Company, as follows:

Brief $202.50

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 74-1325

T. W. PARKER, Commissioner of Transportation
of the State of New York

v.

PENN CENTRAL TRANSPORTATION COMPANY
RAYMOND T. SCHULER, successor to T.W. Parker, Commissioner of
Transportation of the State of New York,
Appellant

(D.C. Civil No. 71-1003)

**Appeal from the United States District Court
for the Eastern District of Pennsylvania**

Submitted Under Rule 12(6) November 21, 1974
Before ADAMS, GIBBONS and WEIS, Circuit Judges

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Trustees for the Property, Debtor

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OPINION OF THE COURT
(Filed January 13, 1975)

PER CURIAM

The State of New York, Department of Transportation, appeals from a final order dated January 23, 1974 entering judgment in favor of the defendant, in the court below, Penn Central Transportation Company (Penn Central). The order was entered in district court civil action No. 71-1003 for the reasons set forth in an opinion dealing with the problems posed by various terminations of service effected by Penn Central pursuant to the provisions of the National Rail Passenger Service Act of 1970, 45 U.S.C. §501 *et seq. See In re Penn Central Transportation Co.*, 370 F. Supp. 22 (E.D. Pa. 1974). Two district court civil actions, in addition to this one, were dealt with in that decision – civil action Nos. 71-1002 and 71-2301. In these, the Commonwealth of Pennsylvania, the City of Philadelphia, the Pennsylvania Public Utility Commission, the United Transportation Union and the State of New Jersey, Department of Transportation were plaintiffs. Separate orders entered therein, exclusive of the one before us now, as well as order No. 1447 of the reorganization court, were before us in consolidated appeals. *City of Philadelphia v. Baker,* Nos. 74-1301, 74-1302, 74-1303 (3d Cir., filed). The State of New York was a party to No. 74-1303, which was the appeal from order No. 1447.

In the case which resulted in the instant appeal the State of New York sought to prevent the termination, pursuant to the Rail Passenger Service Act of 1970, 45 U.S.C. §501 *et seq.*, of passenger trains Nos. 922, 935, 955, 9009, 9014, 9019, 9030 and 9044 which formerly traveled between New York City and Chatham, New York.

The trains, while classified by the ICC as intercity, *Penn Central Transportation Co.*, 338 I.C.C. 660 (1971) (Status of Certain Passenger Service – New York, New York to Chatham, New York), have not been included in the Amtrak system. The object of this appeal is to compel the Penn Central trustees to continue the operation of these trains on the ground that they are commuter trains rather than intercity trains and thus their operation could not be terminated on the authority of the Rail Passenger Service Act of 1970. It is clear that that Act was only intended to govern the operation of intercity trains. The district court, with no party objecting, made a reference to the ICC for findings as to the intercity or commuter nature of the trains in issue. *In re Penn Central Transportation Co.*, 329 F. Supp. 572 (E.D. Pa. 1971) (Discontinuance of Intercity Passenger Service). It ordered the Penn Central trustees to continue the disputed service pending completion of the ICC report. The Commission conducted an investigation, held hearings, and on June 29, 1971 concluded that the New York City to Chatham trains provided intercity rather than commuter service. *Penn Central Transportation Co.*, 338 I.C.C. 660 (1971) (Status of Certain Passenger Service – New York, New York to Chatham, New York). New York objected to the report and prevailed upon the reorganization court to continue in effect its order to continue the service until September 7, 1971. When the district court refused to continue as a preliminary injunction the terms of its temporary restraining order New York appealed. We held that the district court did not abuse its discretion in refusing to grant the pendente lite injunction. *In re Penn Central Transportation Co.*, 457 F.2d 381 (3d Cir. 1972) (Chatham Service). Thereafter the district court afforded New York a full opportunity

to present objections to the ICC report and it did so. The court concluded:

> "The Commission found that, applying [appropriate] criteria, the Chatham service was not 'commuter.' The Commission's findings are clearly supported by substantial evidence." *In re Penn Central Transportation Co.*, 370 F. Supp. 22, 30 (E.D. Pa. 1974).

It therefore entered judgment for defendant in this case. From that determination New York appeals.

New York does not explicitly challenge the district court's conclusion that the Commission's findings are supported by substantial evidence, but contends that some other procedures should have been followed different from those to which on this record it agreed. New York participated in the proceedings before the ICC. It had and took ample opportunity to object in the district court to the Commission's findings. We have reviewed these findings and conclude, as did the district court, that they are supported by substantial evidence. *Cf. Locust Cartage Co. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334 (1st Cir. 1970), *cert. denied*, 400 U.S. 964 (1970).

The judgment of the district court in favor of the defendant will be affirmed.

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

/s/ John Gibbons
Circuit Judge

APPENDIX C

In re PENN CENTRAL TRANSPORTATION COMPANY, Debtor.
In re Discontinuance of INTERCITY PASSENGER SERVICE.
No. 70-347.

United States District Court,
E. D. Pennsylvania.
April 30, 1971.

FULLAM, District Judge.

The Rail Passenger Service Act of 1970, P.L. 91-518, 45 U.S.C. § 501 et seq. (hereinafter referred to as "Amtrak Statute") directly affects only "intercity rail passenger service", defined therein (Section 102(5)) as follows:

> " 'Intercity rail passenger service' means all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple ride and commutation tickets, and by morning and evening peak period operations; and (B) [auto-ferry service pursuant to existing contracts]."

Railroads which have entered into contracts with Amtrak pursuant to the Statute are relieved of their entire responsibility for intercity rail passenger service from and after May 1, 1971. Section 401(a) (1) of the Act provides in relevant part:

> "Upon its entering into a valid contract (including protective arrangements for employees), the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act or any State or other law relating to the provisions of intercity passenger service; *Provided*, that any railroad discontinuing a train hereunder must give notice in accordance with the notice procedures contained in section 13a(1) of the Interstate Commerce Act."

In accordance with Order No. 238 herein the Debtor has entered into a contract with Amtrak under the Statute. At an earlier stage, before this contract was executed, various interested parties and groups became apprehensive that the Debtor contemplated discontinuing some intercity trains even in the absence of such a contract, in violation of the Amtrak Statute. Litigation in other courts was commenced. Ultimately, after hearing, I entered Order No. 232, requiring that no such litigation commence or continue except in this Court or with the approval of this Court, and also directing the Trustees to apply to this Court for permission, upon five days' notice, before discontinuing any intercity trains, for whatever reason. Pursuant to this latter requirement, and having now entered into a contract with Amtrak, the Trustees have petitioned for leave to discontinue all intercity passenger service as of May 1, 1971. (Approximately 70% of the trains affected will be continued in operation by Amtrak under the contract; actual immediate cessation of service is proposed with respect to some 58 trains plus one feeder bus line which runs seven trips per day).

At the hearing, in various procedural ways,[1] the following legal and factual issues have been presented:

1. Was it proper for the Debtor to send out the 30-day notices required by § 13a(1) of the Interstate Commerce Act in advance of the signing of the Amtrak contract, in anticipation of its approval, so that the discontinuances could become effective on May 1, 1971?

2. If so, were the notices actually employed adequate?

3. (With respect to certain of the trains involved) are the trains in question "intercity" within the meaning of the Amtrak Statute?

4. What tribunal has jurisdiction to determine disputes as to whether a particular train is properly classified as "intercity" under the Statute (a) with respect to trains designated for operation by Amtrak, and (b) with

1. In addition to appearing at the hearing, in opposition to the Trustees' petition, certain objectors filed separate actions in this Court for injunctions (Civil Actions Nos. 71-1002 and 71-1003). All of the objectors, including the plaintiffs in those actions, will be referred to herein as "Respondents").

respect to trains not included in the Amtrak contract?

I

[1] Insofar as presently pertinent, § 13a of the Interstate Commerce Act (49 U.S.C. § 13a) provides:

"(1) A carrier * * * may * * file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least 30 days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding."

The Commission has not "otherwise ordered"; indeed, by reason of the provisions of the Amtrak Statute, there would seem to be no legal basis upon which it could "otherwise order."[2] It is clear that the intercity rail service provided by Amtrak is to be in complete substitution for the intercity rail passenger service theretofore supplied by the contracting carrier. The limited jurisdiction and authority of the Commission with respect to such Amtrak service is set forth in detail in the Amtrak Statute.

[2] The obvious purpose of the proviso in § 401(a) (1) requiring the 30-day notice under § 13a(1) of the Interstate Commerce Act is to enable interested governmental and other parties to make decisions with respect to possible requests for further services on a reimbursement basis, as provided in § 403(b) and (c).

It is undisputed that the notices in question (Exhibit T-1 at the hearing) were duly mailed and posted more than 30 days prior to May 1, 1971. The only complaint as to the sufficiency of the notice is that the notice listed for discontinuance all of the intercity passenger trains of the Debtor, rather than merely those trains which would not be operated by Amtrak; and that the notice provided the further information that a substantial number of the listed trains would in fact be operated by Amtrak, without specifying which ones.

[3] The Amtrak Statute, in its provisions relating to discontinuance of intercity passenger service by contracting carriers, draws no distinction between the two categories of trains. If it had been the Congressional intent that discontinuance notices were to be limited to those trains not taken over by Amtrak, the Statute would have so provided. Moreover, both factually and legally, all intercity passenger trains will be discontinued by the Debtor. The fact that the notice contained helpful additional information in order to prevent unjustified alarm on the part of the public does not invalidate the notices. I hold that there has been sufficient compliance with the statutory requirement, and with the ICC regulations on the subject (Ex parte No. 2170, Fed.Reg.Doc. 71-3788, filed 3-17-71).

The state and regional agencies involved have had ample notice of the precise trains proposed to be operated by Amtrak, and could formulate their plans accordingly. Compare State of Montana v. United States, 202 F.Supp. 660 (D. Mont.1962). Moreover, requests for additional service under § 403 of the Act can be made at any time.

[4] Respondents' principal objection to the notices is the assertion that it was necessary for the Debtor to wait until after the Amtrak contract was executed before posting the notices; or, to put it another way, the assertion that the discontinuances could not validly be made effective until at least 30 days after the

2. Note the contrast between the "give notice" language of § 401(a) (1) and the "under the procedures" language of § 404 (b).

contract was signed. In my opinion, this argument is without merit.

Section 401(a) (1) of the Amtrak Statute provides that "upon its entering into a valid contract * * * the railroad shall be relieved of all its responsibilities as a common carrier of passengers by rail in intercity rail passenger service." If Congress had intended the result urged by these Respondents, the Statute would have provided that upon entry into such contract the contracting carrier would be free to give notice of discontinuance, or employed similar language. No valid legislative purpose would be served by requiring unnecessary intercity trains which are not the subject of requests by state or regional agencies for continuation, to be run for the additional 30-day period. As noted above, such requests by state, local and regional agencies can be made at any time (and could have been made during the notice period); and these bodies have received timely notice in advance of the proposed discontinuance. Of even greater significance, however, are the provisions of § 401(c):

> "No railroad or any other person may, without the consent of the Corporation, conduct intercity rail passenger service over any route over which the corporation is performing scheduled intercity rail passenger service pursuant to a contract under this section."

Thus, if Respondents' interpretation were adopted, the Debtor, by delaying posting the notices until signing of the Amtrak contract, would be obligating itself to operate trains thereafter in direct violation of the Act itself.

The procedure followed by the Debtor in this instance is in conformity with the March 17, 1971 regulations of the ICC (Ex parte 217, *supra*). Significantly, in adopting this notice regulation, the Commission found "* * * that the Commission has no jurisdiction or reviewability over said notices, and that the said notices may be effective as early as May 1, 1971 * * *."

I conclude that the Respondents have not asserted any valid objection to the notice procedures.

In considering the jurisdictional issues now before the Court, it is necessary to bear in mind the distinctions set forth in the Amtrak Statute between the "basic system", "new service" supplied by Amtrak, and all other intercity passenger service. Section 202 provides:

> "The basic system as designated by the Secretary shall become effective for the purposes of this Act upon the date that the final report of the Secretary is submitted to Congress and *shall not be reviewable in any court.*"

Section 403 authorizes the corporation to provide additional intercity rail passenger service "in excess of that prescribed for the basic system, either within or outside the basic system * * *", and decrees that any such additional service which is provided by the Corporation for a continuous period of two years "shall be designated by the Secretary as a part of the basic system." Section 404(b) requires the Corporation to continue all service included in the basic system until July 1, 1973; thereafter, discontinuances may be effected "under the procedures of section 13a of the Interstate Commerce Act." Service other than that in the basic system may be discontinued by Amtrak at any time.

[5] It is thus reasonably clear that neither the Commission nor a court would have jurisdiction to review the basic system. Presumably, this would include the designation of specific trains within the basic system, although this is perhaps less clear. Whether the Commission or a court would have jurisdiction to review a determination by the Corporation that "new service" trains are intercity is difficult to discern from the statutory language. It may be that the draftsmen of this legislation paid scant attention to this precise question, on the assumption that litigation under the Statute would be more likely to involve service that was being discon-

tinued, rather than concern about who would be rendering the service.

The respondents, however, take the position that it does make a substantial difference to them whether the 600 series of trains between Philadelphia and Harrisburg, and the 200 series of trains between Philadelphia and New York, all of which are included in the Amtrak contract, are to be operated as intercity trains by Amtrak, or as commuter trains by the Debtor. If the former, as now contemplated, these trains could theoretically be discontinued at any time, since they were added after the basic system was established.

This much, at least, is certain: It is essential that uniform standards be applied in determining whether or not a given train is intercity. The Interstate Commerce Commission has already made such determinations in at least one case, *Penn Central Transportation Company discontinuance or change in service of 22 trains between Boston, Massachusetts and Providence, Rhode Island*, Finance Docket 26200 (decided February 10, 1971), a decision which attempts to flesh out the Statutory definition into practical guidelines for application in particular cases. Moreover, it is important that the standards which are to be applied for present purposes should be consistent with the standards applied in "avoidable loss" determinations under Section 401 (a) (3) of the Statute, a matter which is expressly within the jurisdiction of the Commission in the event of dispute.[3] And, finally, categorization of train service in this context is obviously a matter within the expertise of the Commission.

[6–8] Accordingly, the parties have indicated that they would have no objection if the Court should refer these issues to the Commission for initial study and determination. 28 U.S.C. § 1336(b) clearly contemplates such references. And cf. Illinois Commerce Commission v. Chicago & Eastern Illinois R. R. Co., 400 U.S. 987, 91 S.Ct. 449, 27 L.Ed.2d 434 (1971). As stated by the Supreme Court in United States v. Western Pacific Railroad (1956) 352 U.S. 59 at pp. 63–64, 77 S.Ct. 161 at p. 165, 1 L.Ed.2d 126:

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S.Ct. 325, 331, 84 L.Ed. 361."

The Court has been advised informally that the Commission would be willing to undertake such a reference. Under these circumstances, it is unnecessary to decide the precise basis for referral.

The remaining question is whether a deadline should be fixed for the Commission's initial determination. With respect to the trains which will be operated under the Amtrak contract in any event, namely, the 600 series between Philadelphia and Harrisburg and the 200 series between Philadelphia and New York, there is no immediate urgency. The same is true with respect to trains Nos.

3. By order entered April 5, 1971, ex parte No. 268, the Commission has instituted a rule-making procedure under 49 C.F.R. Chapter X with respect to such determinations. Unfortunately, that proceeding, although timely for its own purposes, is not likely to be concluded within the time during which decision of the present issues must be made.

22, 23, 176 and 177 in New Jersey, as to which the objecting parties are apparently satisfied with the Amtrak arrangements on an interim basis. However, with respect to the New York City to Chatham, New York trains, and the bus service between York, Pennsylvania, and Lancaster, Pennsylvania, it would be desirable to have a prompt determination made; the Debtor will be required to operate some of these lines at a loss in the interim. With respect to the Amtrak trains in question, the Debtor will be required to resume their operation in the (unlikely) event of discontinuance of Amtrak, pending the initial determination by the Commission.

APPENDIX D

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor.

In re DISCONTINUANCE OF INTER CITY PASSENGER SERVICE.

CITY OF PHILADELPHIA, COMMONWEALTH OF PENNSYLVANIA, et al., (Party Plaintiffs),

v.

George P. BAKER et al.

T. W. PARKER, Commissioner of Transportation of the State of New York,

v.

PENN CENTRAL TRANSPORTATION COMPANY.

COMMONWEALTH OF PENNSYLVANIA et al., Plaintiffs,

v.

George P. BAKER et al., Defendants.

Civ. A. Nos. 71-1002, 71-1003 and 71-2301.

United States District Court,
E. D. Pennsylvania.
Jan. 23, 1974.

OPINION

FULLAM, District Judge.

Pursuant to the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 et seq., the Debtor no longer provides, or is required to provide, intercity rail passenger service. Since May 1, 1971, all such service has been provided by Amtrak, by means of contracts entered into with various rail carriers, including the Debtor.

Various aspects of the implementation of the Amtrak statute have been the

subject of litigation in this Court. Final decision of certain issues has been deferred pending decision of closely related issues by the Supreme Court of the United States. The Supreme Court has now spoken, National Railroad Passenger Corporation v. National Association of Railroad Passengers, — U.S. —, 94 S.Ct. 690, 38 L.Ed.2d 646, (1974), and it is appropriate that the pending litigation in this Court now be brought to a close.

The procedural background is somewhat complicated. It will be reviewed here only to the extent that such review may help clarify precisely what is being decided.

Before the Trustees had reached a final decision as to whether to participate in the Amtrak program, the Commonwealth of Pennsylvania and various other parties brought an action in the United States District Court for the Western District of Pennsylvania, seeking injunctive relief against the threatened discontinuance of certain trains. This Court, by Order No. 232, stayed this litigation, and enjoined all further litigation of issues relating to the Debtor's intercity passenger service, except such litigation as might be brought in this District. At the same time, in order to allay the fear that discontinuance of such service might be attempted in violation of the Amtrak statute, I also enjoined the Trustees from effecting any such discontinuance, except pursuant to an order of this Court entered after at least five days' notice.

Thereafter, having entered into an approved contract with Amtrak, the Trustees petitioned this Court for leave to discontinue all intercity passenger service. Certain parties, principally the Commonwealth of Pennsylvania and its Public Utility Commission, the City of Philadelphia, the State of New York and the State of New Jersey, opposed the Trustees' request, in certain particulars hereinafter discussed. Concurrently, many of these same parties filed suit in this District, Civil Action Nos. 71-1002 and 71-1003, seeking to enjoin the Trustees from discontinuing certain trains. The cases were consolidated for hearing.

The parties objecting to the discontinuances contended that the notices of proposed discontinuance, promulgated by the Trustees and scheduled to become effective on May 1, 1971, were premature, and could not be made effective on that date; and that the notices were not in compliance with the Amtrak statute. They further contended that certain service proposed to be discontinued by the Trustees was not "intercity" service within the meaning of the statute, and therefore could not be discontinued by the Trustees.

On April 30, 1971, I filed an Opinion (D.C., 329 F.Supp. 572) holding that the notices were timely and in accordance with the statute, and that the question of whether certain service was "intercity" or otherwise would be referred to the Interstate Commerce Commission for its recommendation and report. Thereafter, the ICC filed its recommendations and report, and the Commonwealth of Pennsylvania and other parties filed a separate action in this District, seeking "implementation" of the ICC "order." (C.A. 71-2301.) The State of New Jersey intervened, the Interstate Commerce Commission was brought upon the record, exceptions and motions to dismiss were filed, and extensive briefing followed.

The particular services in question, and the present status of each, follows:

1. *New York City to Chatham, New York.* This was not included in the Amtrak contract. The ICC found that this was "intercity" rather than "commuter" service. With the approval of this Court (unnecessary under the statute, but required by the terms of the earlier Order (No. 232) of this Court), the Trustees discontinued this service at the end of the summer of 1971, and this Court's refusal to compel continuation was upheld on appeal, as equivalent to a denial of a preliminary injunction, In re Penn Central Transportation Co., ap-

peal of State of New York, 457 F.2d 381 (3d Cir. 1972).

2. *York, Pennsylvania Substituted Bus-for-Rail Service.* The ICC concluded that this service was not within the terms of the Amtrak statute, which the Commission interpreted as applying only to intercity rail service, not substituted bus-for-rail service. This service is being operated at the present time.

3. *The 600 Series of Trains Between Philadelphia and Harrisburg, Pennsylvania.* This service is included in the Amtrak contract. However, the Commonwealth of Pennsylvania and other parties contend that this is really commuter service, and should be the responsibility of the Debtor, subject to discontinuance only with the approval of the Public Utilities Commission (or of the ICC under § 13 of the Interstate Commerce Act). The ICC report concluded that this is "back-to-back" commuter service, rather than "intercity" service.

4. *The 200 Series of Trains Between Philadelphia and New York.* This service is included in the Amtrak contract. The ICC report concludes that this is "commuter" service, rather than "intercity" service. The State of New Jersey contends that operation of these trains by Amtrak is in derogation of the rights of the State of New Jersey pursuant to certain contracts with the Debtor and others for commuter service in that State.

I.

[1, 2] It is important at the outset to emphasize certain distinctions apparent in the scheme of the Amtrak statute. The "basic system" designated by the Secretary of Transportation is "not reviewable in any court" (§ 202). Amtrak's right to operate trains constituting a part of the "basic system" cannot be questioned in any court, or in any administrative proceeding; conversely, Amtrak must continue to operate such trains unless and until it seeks and obtains the permission of the ICC to discontinue them. In addition to the "basic system," Amtrak has the right to operate other intercity passenger trains, on a more or less experimental basis. These "additional" or "excess" trains may be discontinued by Amtrak at any time, in its sole discretion. However, any train which is operated by Amtrak continuously for a period of two years or more automatically becomes part of the "basic system" and subject to ICC abandonment control

The foregoing principles are applicable on the assumption that the trains in question are "intercity" trains. Beyond defining, in a rather imprecise way, what is meant by "intercity" passenger service, the statute is silent on such matters as: How and by whom is the determination to be made as to whether a particular train or group of trains constitute "intercity" or other service? Is this determination reviewable, and if so, where? What are the standards of review?

The litigation which resulted in the recent decision of the Supreme Court in National Railroad Passenger Corporation v. National Association of Railroad Passengers, *supra*, provides some answers, and some clues to other answers, but does not completely and explicitly resolve the present controversies. Two related, but distinct, cases were before the Court of Appeals: one involved a discontinuance by Amtrak of certain intercity trains constituting "excess" service, rather than a part of the "basic system." This was the only case to reach the Supreme Court. The Court held that § 307 of the Amtrak statute, which authorizes the Attorney General to bring suit for violation of the statute, precludes all such litigation by other parties. In its simplest terms, the holding of the Court was that, by virtue of the Amtrak statute, no one other than the Attorney General has a cause of action against Amtrak or against any railroad, for violations of the statute or actions inconsistent with the provisions of the statute. The Court intimated that the same result would be reached on "standing"

principles. The determination of the Court of Appeals that such suits could be maintained by private parties was reversed.

The other case decided by the Court of Appeals, but not by the Supreme Court, was an attempt by private litigants to enjoin the proposed discontinuance of certain rail service which had not been assumed by Amtrak. Plaintiffs in that case asserted that the service in question was commuter in nature, and thus not governed by the Amtrak statute; whereas the railroad argued that it was "intercity" service and could properly be discontinued since it had not been assumed by Amtrak. The Court of Appeals held that the District Court had jurisdiction to determine this issue, and remanded the case for appropriate determination. The Court of Appeals expressed no view as to the merits, nor even as to the proper procedure to be followed in reaching a decision (*i. e.*, whether through referral to the ICC, or by the Court independently).

As mentioned above, this Court has referred the definitional issues to the Interstate Commerce Commission and has received the reports and findings of the Commission. This was done at the request of most of the parties, and without opposition from anyone. For this reason, the precise nature of the referral has never been specified, and the parties remain free to argue, as some of them do, that neither the ICC nor this Court has jurisdiction, and that the referral was improper, or that the findings and report of the Commission are merely advisory.

II.

In deciding that only the Attorney General could bring suit for infractions of the Amtrak statute, the Supreme Court relied not only upon the language of the statute (which it held would normally be interpreted to produce that result) but upon the legislative history, which, in the view of the Court, very clearly demonstrated the Congressional intent that, in order to salvage intercity rail passenger service, Amtrak must be free to use the streamlined procedures of the Amtrak statute in ridding itself of uneconomic lines. It was felt that the obvious purposes of the statute would be frustrated if Amtrak (and the railroads performing functions under the Amtrak statute) were subject to suit by private litigants.

The precise legal issue which plaintiffs sought to raise in that case was whether Amtrak, by contracting with a wholly-owned subsidiary railroad, could relieve that subsidiary of its obligation to provide intercity rail passenger service, in the absence of a contract with the parent. Both the Court of Appeals and the Supreme Court viewed the case as challenging a termination of service pursuant to the Amtrak statute, rather than as asserting that the termination was a violation of the Interstate Commerce Act, or some other statute or regulation.

In the companion case in the Court of Appeals, in which Supreme Court review was not sought, Amtrak itself was not directly involved. The B & O Railroad sought to discontinue certain trains which Amtrak had not agreed to be responsible for, and the plaintiffs sought to obtain a declaratory judgment that such discontinuance was a violation of other regulatory statutes, since the trains in question were "commuter" rather than "intercity." The Court of Appeals held that, while the District Court did not have jurisdiction to enjoin the discontinuance (that being essentially a state cause of action), it did have jurisdiction to render a declaratory judgment as to whether the service was or was not "intercity" within the meaning of the Amtrak statute.

[3] In my judgment, the rationale of the Supreme Court opinion requires that a distinction be made in the present case between those trains which are actually being operated pursuant to an Amtrak contract, and those trains which are not covered by an Amtrak contract. Given the clear Congressional intent to enable Amtrak to fashion and operate a viable system of intercity passenger service,

the Court held, it follows that private litigants are not to be permitted to interfere with the performance of that function. The fulfillment of Amtrak's role depends as much upon the service which it does provide as upon its ability promptly to terminate uneconomic service. If no one but the Attorney General may sue to prevent Amtrak from discontinuing a train, surely no one but the Attorney General should be allowed to sue to compel Amtrak to surrender a particular service.

[4] In short, Congress has effectively precluded judicial review of Amtrak's characterization of specific trains as constituting "intercity" passenger service. With regard to such trains as form a part of the "basic system," the denial of judicial review has been made explicit in § 202 of the Act. With regard to "additional" service furnished by Amtrak, the reasoning of the Supreme Court in the *National Rail Passenger* case, *supra*, would seem to preclude judicial review at the suit of anyone but the Attorney General, at least so long as the service is being provided by Amtrak. Whether there may remain a residual cause of action which might later be asserted by private litigants against railroads in the event of unilateral termination of such service by Amtrak seems doubtful but in any event need not be decided now. Amtrak has contended in this litigation that both the 200-series and the 600-series of trains have been part of the "basic system" from the beginning. The parties have devoted much argument to the precise definition of the "basic system," a question as to which the statute is not altogether clear.[1] But since both series of trains have now been in operation pursuant to the Amtrak contract for more than two years, both series are undoubtedly now a part of the "basic system," and possible future discontinuances can result only if authorized by the ICC pursuant to § 13 of the Interstate Commerce Act.

I therefore decline to consider whether the ICC had jurisdiction to characterize these trains as "commuter," or whether such characterization was correct.

[5] Different principles are applicable to contests over the discontinuance of trains which are not being operated under an Amtrak contract. To the extent that these provide intercity service, it is clear that the Amtrak statute permits immediate discontinuance by the carriers. Indeed, it would be a violation of the Amtrak statute for any carrier which has entered into a contract with Amtrak to provide intercity passenger service, except pursuant to its Amtrak contract (§ 401(c)). But it is equally clear that the Amtrak statute does not apply to commuter trains, and was not intended to alter the legal requirements, both substantive and procedural, which railroads must meet before discontinuing commuter service. The Amtrak statute does not provide a mechanism for determining which of a railroad's non-Amtrak passenger service is "commuter" and therefore must be continued. But this, of course, does not mean that Congress intended that such disputes could never be resolved.

[6] It is correct that the successful assertion by state or local private litigants that certain trains are "commuter," and cannot be discontinued, can have a substantial impact upon Amtrak's operations. But Amtrak itself has standing to intervene in any such litigation and defend its position. The Attorney General would presumably have little interest in attempting to establish that a particular non-Amtrak service is "commuter" and therefore must be continued. In the unlikely event that a railroad insisted upon operating an "intercity" train by labeling it "commuter"

1. One problem is whether the "basic system" consists of sets of terminal points between which service is to be offered (*i. e.*, "lines on a map"), or the actual trains to be operated between such points. Another issue is whether trains which travel only part way between the designated terminal points are "basic" trains.

service, presumably both Amtrak and the Attorney General would have a cause of action under the Amtrak statute to prevent such violation of that statute. But, at least in cases in which neither Amtrak nor the Attorney General perceives any threat to Amtrak's operations, other parties which do have an interest in the determination must have standing to obtain such a determination, and a forum.

III.

[7] Plaintiffs in Civil Action Nos. 71-2301 and 71-1002 requested the convening of a three-judge court, on the theory that 28 U.S.C. § 2325 is applicable. That statute requires a three-judge court in cases involving an application for

> "an interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission."

That statute does not apply to the present case, since no "order" of the Commission is involved, and no injunction restraining enforcement of such an order is sought. The ICC itself has pointed out that no orders have been entered by the Commission, and that its reports are purely advisory in character. Finance Docket 26632 and 26634.

Moreover, in cases referred to the Commission pursuant to 28 U.S.C. § 1336(b), it is clear that "the court which referred the question or issue shall have exclusive jurisdiction" over any subsequent review of the Commission's action. *See* also 28 U.S.C. § 1398(b). The cases of Keller Industries, Inc. v. United States, 449 F.2d 163, 167 (5th Cir. 1971) and International Transport, Inc. v. United States, 337 F.Supp. 985 (W.D. Mo.1972) are further authority for denying the application for a three-judge court.

This Court's previous determination that, because of this Court's continuing jurisdiction over Debtor's contract with Amtrak, litigation over discontinuances in connection with implementation of the Amtrak statute should be confined to this District, has been upheld on appeal, In re Penn Central Transportation Co., Appeal of Congress of Rwy. Unions, et al., 446 F.2d 1109 (3d Cir. 1971), and the Third Circuit has also held that there is no basis for transferring this litigation to another judge. In re Penn Central Transportation Co., Appeal of State of New York, 457 F.2d 381, at 387 (3d Cir. 1972).

IV.

A. *The Chatham, New York to New York City Service.*

As noted earlier, this Court, in the reorganization proceedings, as a precautionary measure, enjoined the Trustees from discontinuing any passenger service except as might be permitted by this Court after five days' notice to all interested parties. The primary purpose of this Order (No. 232) was to make certain that, unless and until a contract between the Debtor and Amtrak was approved by this Court, after due notice and hearing, the *status quo* would be preserved. After the Amtrak contract was approved, this Court granted the Trustees' application to discontinue all intercity passenger service (specified in the Trustees' application) except in those few instances where opposition was expressed on the theory that the particular service was "commuter" rather than "intercity." Those cases were referred to the ICC for recommendation and report.

In the Chatham case, the ICC found that the service was indeed "intercity," rather than "commuter," and this Court thereupon dissolved the temporary injunction and authorized the discontinuance. The Court of Appeals viewed the case as one in which this Court had declined to grant a further preliminary injunction against the discontinuance. Finding that the State of New York had not demonstrated a likelihood of ultimate success on the merits, and that the potential for irreparable harm if the trains were discontinued was outweighed by the irreparable harm the Debtor would have suffered if the discontinu-

ance had been enjoined, the Court of Appeals affirmed. In re Penn Central Transportation Co., Appeal of the State of New York, *supra*.

Unlike the Pennsylvania litigants, the State of New York has not filed any separate plenary action challenging the ICC determination, but has relied upon the presentation it made, in the reorganization proceeding and in C.A. No. 71-1003, in opposition to the Trustees' request for leave to discontinue the trains. In fairness, it must be said that the procedural approach adopted by the State of New York is in accord with my own views of the procedural setting.

[8] It is clear that the record is complete. In order to remove any doubt about finality, I now expressly find that the trains in question, which provided passenger service between Chatham, New York and New York City, were "intercity" trains within the meaning of the Amtrak statute, and were not "commuter" trains. A declaratory judgment to that effect will be entered, and the papers filed on behalf of the State of New York in opposition to the Trustees' application for leave to discontinue the trains will be treated as an application for an injunction against such discontinuance. A final order will be entered, denying the requested injunction.

The Amtrak statute defines "intercity rail passenger service" as meaning

> ". . . all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (B) [auto ferry service] . . . ." 45 U.S.C. § 502(5).

In an earlier proceeding, Penn Central Transportation Co. Discontinuance or Change in Service, 338 ICC 318, 326 (1971), the Commission announced certain criteria to be used in applying the statutory definition. These are:

> "(1) The passenger service is primarily being used by patrons traveling on a regular basis either within a metropolitan area or between a metropolitan area and its suburbs;
>
> "(2) The service is usually characterized by operations performed at morning and evening peak periods of travel;
>
> "(3) The service usually honors commutation or multiple-ride tickets at a fare reduced below the ordinary coach fare and carries the majority of its patrons on such a reduced fare basis;
>
> "(4) The service makes several stops at short intervals either within a zone or along the entire route;
>
> "(5) The equipment used may consist of little more than ordinary day coaches;
>
> "(6) The service should not extend more than 100 miles at the most, except in rare instances; although service over shorter distances may not be commuter or short-haul within the meaning of the exclusion."

The Commission found that, applying these criteria, the Chatham service was not "commuter." The Commission's findings are clearly supported by substantial evidence. I am persuaded that the findings are correct. If the matter were before me *de novo*, I would reach the same conclusions, and would do so irrespective of the allocation of the burden of proof. Thus, under any view of the matter, the decision previously reached should be made final.

Some further comment may be appropriate. The criteria promulgated by the Commission appear to be consistent with the statutory definition. The Commission has apparently experienced little difficulty in successfully applying these criteria to particular factual situations, recognizing, of course, that the criteria represent guidelines, rather than inflexible standards. As applied in the present case, while train service between Chatham and New York City may not, strictly speaking, be service between

two distinct metropolitan areas, neither can it be regarded as service between a metropolitan area and its suburb. The distance involved, and the other characteristics of the service, militate against a "commuter" label.

It can be argued that the Commission's finding in the Chatham case is inconsistent with its finding in the 600 series, Philadelphia to Harrisburg, case. However, in the latter, the Commission admittedly injected a new approach, in attempting to characterize service between two relatively distant cities as "back-to-back" commuter service. The validity of this approach is questionable, but that issue is not before the Court, as discussed above. In any event, there would seem to be little similarity between the Chatham service and the Philadelphia to Harrisburg service.

B. *Substituted Bus-for-Rail Service Between York, Pennsylvania and Lancaster, Pennsylvania.*

On May 30, 1952, the Pennsylvania Public Utility Commission, on a temporary basis, authorized Pennsylvania Greyhound Lines, Inc. to operate bus service in substitution for the rail service theretofore furnished by the Pennsylvania Railroad between York and Lancaster, Pennsylvania, a distance of about 24.7 miles. As of November 9, 1953, the PUC authorized discontinuance of the rail passenger service between York and Lancaster. Docket No. 78915; aff'd Sherwood, Appellant v. Pennsylvania Public Utility Commission, 177 Pa.Super. 6, 109 A.2d 220 (1954).

On January 14, 1963, the PUC authorized the Conestoga Transportation Company, pursuant to an agreement with the railroad, to take over that bus service, and Greyhound then discontinued its local service (but continues to perform the long-distance service between the two cities).

On the theory that this service was, in reality, merely a substituted method of providing transportation for rail passengers between the two cities (*i. e.*, that this service was part of the Debtor's intercity passenger service, which was not being assumed by Amtrak), the Trustees gave notice of proposed discontinuance, pursuant to the Amtrak statute.

Although noting that, on the average, each of these busses carries only 3.7 paying passengers per trip, the ICC report concluded that such discontinuance could not be achieved pursuant to the Amtrak statute. The decision rests upon an extremely narrow and technical interpretation of the statute. It is noteworthy that the Commission did not find that this was "commuter" service, or that it was not a part of the Debtor's intercity passenger service. The decision rests entirely upon the following reasoning:

> There is nothing in the Amtrak statute, or in its legislative history, which expressly covers substituted bus-for-rail service. Section 401(a)(1) of the statute provides that any railroad "discontinuing a train" must give notice in accordance with the procedures of § 13(a)(1) of the Interstate Commerce Act, and § 13(a)(1) of the Interstate Commerce Act governs notices pertaining to trains and ferries, New Jersey v. New York S & W Ry. Co., 372 U.S. 1, 83 S.Ct. 614, 9 L.Ed.2d 541 (1963). Since notice cannot be given pursuant to § 13(a)(1) of the Interstate Commerce Act, the discontinuance of this bus service would have to occur without any officially approved notice. And since there is no suggestion that Congress intended to authorize discontinuances without notice, it must follow that Congress did not intend, in the Amtrak statute, to authorize discontinuances of services such as the York to Lancaster bus-for-rail service.

[9] I cannot accept the ICC's reasoning, but I reach the same result on somewhat broader grounds (perhaps intended to be a basis for the ICC decision, although seemingly not expressed therein): New Jersey v. New York S & W Ry. Co., *supra*, shows that even the commonly understood remedial purposes underlying a statute cannot justify a

court in supplying statutory provisions which have been omitted from the enactment. That case involved the proposed discontinuance of substituted bus-for-rail service which formed a link in the undoubtedly interstate movement of passengers by railroad. The issue was whether the discontinuance could be accomplished pursuant to § 13(a)(1) of the Interstate Commerce Act, permitting streamlined abandonment proceedings for interstate situations, or whether the abandonment must proceed pursuant to § 13(a)(2) of the Act, governing intrastate matters. The Supreme Court, although noting the remedial purpose behind the 1958 amendment to the Act, nevertheless adhered to a literal reading of the statute and held that, even though the busses traveled from a point in New Jersey to a point in New York, their discontinuance did not fall within § 13(a)(1), which provides for "the discontinuance . . . of the operation or service of any train or ferry operating from a point in one State to a point in any other State"

[10] Although the question is not free from doubt, I have concluded that there is nothing in the Amtrak statute or its history which permits a different result here. Accordingly, the Trustees will be required to obtain the approval of the Pennsylvania Public Utility Commission before discontinuing the York to Lancaster bus service.

V.

Certain issues related to the position of the State of New Jersey in this litigation remain for discussion.

By Order No. 134, entered January 25, 1971, the State of New Jersey was permitted to intervene as a party in the reorganization proceedings. As such, it was duly notified of the hearings on the Trustees' petition for authorization to enter into a contract with Amtrak. Hearings on the Trustees' application were held on April 20 and 23, 1971. The State of New Jersey did not participate in those hearings. By Order No. 238, entered on April 27, 1971, this Court approved the Amtrak contract.

Thereafter, on August 28, 1971, a hearing was held on the Trustees' application for leave to discontinue intercity passenger service. The State of New Jersey appeared at that hearing, and did not object to the proposed discontinuance of the trains in the 200 series, nor did it raise any question concerning those trains. Counsel for the State of New Jersey merely sought clarification of the status of four trains, which he was then unable to identify. He was afforded an opportunity to advise the Court and the parties just which trains he was concerned about, and did so (they were trains Nos. 22 and 23, operating between New York City and Chicago; and Nos. 176 and 177, operating between Boston and Washington, D. C.).

Order No. 244 referred the status of, *inter alia*, the 200 series of trains, to the ICC for recommendation and report; and Order No. 245 authorized the discontinuance of intercity rail service with certain exceptions therein stated. With respect to the 200 series, Order No. 245 required the Trustees to resume their operation, in the event Amtrak should discontinue them, pending final action on the ICC report. The State of New Jersey joined in consolidated appeals from both of those orders.

At the ICC hearings, New Jersey apparently took the position, for the first time, that the 200 series of trains should be regarded as "commuter." After the ICC report was filed, the Commonwealth of Pennsylvania and various other parties filed Civil Action No. 71-2301, seeking "enforcement" of the ICC "orders." Eventually, the State of New Jersey sought leave to intervene as a party plaintiff, and to file its own complaint, in that action. Intervention was sought on or about December 27, 1971. The other plaintiffs in that case consented to the intervention, the defendants opposed it. On February 14, 1972, this Court entered an Order permitting the intervention sought.

The complaint filed by the State of New Jersey in Civil Action No. 71-2301 is a prolix and somewhat confusing document. But for the fact that it includes a prayer for general relief, the entire thrust of the complaint is addressed to preventing Amtrak from operating the 200 series of trains, and requiring the Trustees to operate them, on the theory that they are "commuter" in nature. In that complaint, the State of New Jersey asserted for the first time that implementation of the Amtrak contract, with respect to the 200 series of trains, would be in derogation of New Jersey's rights under an earlier contract between the State of New Jersey and the Trustees. Motions to dismiss were filed by all of the defendants.

It is interesting to note that, in resisting the defendants' attempts to prevent late joinder in the action, and in resisting the defendants' motions to dismiss, New Jersey appeared to argue that it was merely echoing the arguments already presented by the Commonwealth of Pennsylvania and the other plaintiffs, and therefore that its delay was of no significance. However, its brief also contains arguments, not clearly articulated, to the effect that implementation of the Amtrak contract amounted to a breach of the Trustees' earlier agreement with the State of New Jersey.

To the extent that the State of New Jersey seeks merely to prevent Amtrak from operating the 200 series of trains, I conclude, for the reasons stated earlier in this Opinion, that this Court is precluded from considering the matter. And it may be that that is the only relief actually being sought by New Jersey.

[11] It is, however, arguable that the Amtrak statute does not provide a basis for precluding New Jersey from attempting to secure other forms of relief from the Trustees. But to the extent that any such cause of action is premised upon the implementation of the Trustees' contract with Amtrak, I hold that any such cause of action is barred by *res judicata*. The State of New Jersey had an opportunity to object to the Amtrak contract for any and all of the reasons now asserted. By failing to oppose or to appeal from Order No. 238, New Jersey is now precluded from asserting that its rights under its earlier contract have been improperly abridged by reason of the Amtrak arrangement.

Because these claims are barred, I find it unnecessary to consider the Trustees' challenge to the continuing efficacy of the earlier contract.

VI.

In conformity with the views expressed in this Opinion, appropriate orders will be entered dismissing the plenary actions, vacating the injunctive provisions of Order No. 245 (except for the York to Lancaster substituted bus-for-rail service), and declaring that the Chatham, New York to New York City trains are "intercity" and were properly discontinued by the Trustees pursuant to the Amtrak statute.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 26632

PENN CENTRAL TRANSPORTATION COMPANY (DEBTOR)— STATUS OF CERTAIN PASSENGER SERVICE

Decided June 24, 1971

Upon investigation: (1) found that the substituted bus-for-rail service here in question is not "intercity rail passenger service" within the meaning of section 102(5) of the National Railroad Passenger Service Act of 1970; and (2) found that trains Nos. 600 through 617 do not constitute "intercity rail passenger service" within the meaning of section 102(5) of the National Railroad Passenger Service Act of 1970.

Donald A. Brinkworth for the trustees of Penn Central Transportation Company (debtor).

Peter B. Work for the National Railroad Passenger Corporation.

Gordon P. MacDougall for the Commonwealth of Pennsylvania.

Larry Gesoff and *Edward Munce* for the Pennsylvania Public Utility Commission.

Edward A. Harvey for Southeastern Pennsylvania Transportation Authority.

Herbert Smolen for the city of Philadelphia.

T. P. Shearer for the Cooperative Legislative Committee, Railroad Brotherhoods in Pennsylvania.

REPORT OF THE COMMISSION

BUSH, *Commissioner:*

The proceeding is before us for the following determinations: (1) whether the subject buses, buses Nos. 0552, 0553, 0557, 0558, 0559, 0560, and 0572 between Lancaster, Pa., and York, Pa., constitute "intercity rail passenger service" within the meaning of section 102(5)[1] of the Rail Passenger Service Act of 1970, P. L. 91-518, 45 U.S.C. § 501 *et seq.* (hereinafter called the Amtrak Statute); and (2) whether the subject trains, trains Nos. 600 through 617 between

[1]Sec. 102(5) reads in full:

Intercity rail passenger service means all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (B) auto-ferry service characterized by transportation of automobiles and their occupants where contracts for such service have been consummated prior to enactment of this Act.

Harrisburg, Pa., and Philadelphia, Pa.,[2] constitute "intercity rail passenger service" within the meaning of section 102(5) of the Amtrak Statute. The aforesaid buses and trains were operated prior to May 1, 1971, by George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and W. Willard Wirtz, trustees of the property of Penn Central Transportation Company (debtor), hereinafter called Trusees or Penn Central. Effective May 1, 1971, the trains have been designated by the National Passenger Corporation (Amtrak) as "Amtrak trains"; however, they are operated by Penn Central pursuant to a contract with Amtrak. Penn Central also has a contract with Southeastern Pennsylvania Transportation Authority (SEPTA) for the operations of the 600-series trains, and this contract expires June 30, 1971.

On March 31, 1971, the Trustees filed and posted notice of their intention to discontinue all of their intercity passenger trains, in accordance with the provisions of section 401(a)(1) of the Amtrak Statute, and the regulations issued thereunder by the Interstate Commerce Commission. 49 CFR 1122.9.[3] Included in Penn Central's notice of discontinuance were the 17 600-series trains and the 7 involved substituted bus-for-rail schedules. On April 28, 1971, the Commonwealth of Pennsylvania (Commonwealth), Pennsylvania Public Utility Commission (PUC), City of Philadelphia (City), and United Transportation Union filed a complaint in the United States District Court for the Eastern District of Pennsylvania, civil action No. 71-1002, *City of Philadelphia, et al.* v. *Baker, et al.*, alleging that the aforementioned trains were "commuter" or "short-haul" passenger trains and that the seven bus schedules had been incorrectly included in the discontinuance notices. This matter was referred to District Judge John P. Fullam who by Order No. 244, dated April 30, 1971, *In the Matter of Penn Central Transportation Company, Debtor*, Bankruptcy No. 70-347, required Penn Central to continue operation of the trains, in the event any were discontinued by Amtrak, and to continue the substituted bus-for-rail service, pending his subsequent decision.

By its Order No. 245, dated April 30, 1971, the court referred the aforementioned issues to the Commission and directed that it be advised in the circumstances within 30-days' time, unless within such time, the Commission were to apply to the court, upon cause shown,

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[2]The 17 trains involved herein are trains Nos. 600 through 615, and train No. 617; and hereinafter they will be referred to collectively as the 600-series trains or the Harrisburg service. While trains Nos. 618 and 633 have been added, effective on or after May 1, 1971, these trains are not included in our reference to the 600-series trains or the Harrisburg service.

[3]Ex Parte No. 217, 36 F.R. 5219-20, March 18, 1971.

for an extension of time not to exceed an additional 30 days. Such request was timely met on behalf of the Commission. Pursuant to this order, the Commonwealth and the Trustees filed a petition and application, respectively, seeking a determination of the aforementioned issues. The Commission by its order of May 6, 1971, set these matters for hearing on an expedited schedule for the limited purpose of receiving evidence concerning the operation and service of the involved buses and trains.

Our order provided, *inter alia*, that the Penn Central shall, prior to a specified time, "post, in a conspicuous place in each station, depot, car, and bus affected by the proposed change in service, a notice setting forth the places, dates, and times of the hearings herein prescribed and a clear and concise statement of the issues involved; and shall certify to the hearing examiner at the hearing that said posting has been made." Public hearings were held on May 19, 20, 21, and 22, 1971, at Philadelphia, Lancaster, Harrisburg, and York, Pa., respectively. Appearances were entered on behalf of the Trustees, Amtrak, Commonwealth, PUC, SEPTA, City, and the Cooperative Legislative Committee, Railroad Brotherhoods in Pennsylvania (Brotherhoods).[4] Briefs were filed and have been considered.

Initially, we must consider the Brotherhoods' contention that Penn Central's certification to the hearing examiner fails to comply with the Commission's order cited above. Rather than post a separate notice "setting forth * * * a clear and concise statement of the issues involved," Penn Central merely posted copies of the Commission's order which included the aforementioned information in legal terminology. We believe a separate statement, in larger print and in nonlegal terms, containing the requisite information should have been posted by Penn Central. While our order of May 6, 1971, contained the requisite information, it was of necessity quite lengthy, and perhaps was not as conducive to a layman's understanding of the issues, as a separate statement, in larger print and of much shorter length, would have been. However, in view of the evidence entered and the number of witnesses appearing and testifying, we conclude that Penn Central's failure to fulfill the aforementioned requirements does not constitute prejudicial error under the circumstances reflected on this record.

At the hearing, testimony in support of a finding that the involved train and substituted bus-for-rail transportation is not "intercity rail passenger service" within the meaning of section 102(5) of the

[4]The United Transportation Union is a part of the Brotherhoods.

Amtrak Statute, was given by the Governor of Pennsylvania, the chairman of PUC, the City's deputy commissioner of the Department of Public Property, the deputy secretary for Local and Area Transportation of the Commonwealth's Department of Transportation, 3 witnesses on behalf of the Brotherhoods, and 10 members of the public. Four witnesses on behalf of Penn Central testified in support of a finding that the involved transportation constitutes "intercity rail passenger service" within the meaning of the Amtrak Statute.

Attached hereto as appendix A is a straight line diagram map reflecting Penn Central's rail route between Philadelphia and Harrisburg, the substituted bus-for-rail service route between Lancaster and York, and the respective mileage tables. The 600-series trains operate a distance of 103.2 miles within three contiguous metropolitan areas as defined in the Bureau of Census Standard Metropolitan Statistical Area: Philadelphia Standard Metropolitan Statistical Area (SMSA), Lancaster SMSA, and Harrisburg SMSA. In addition to the two termini (Harrisburg and Philadelphia's Suburban Stations), 12 intermediate stations are served with two or more weekday schedules. The minimum distance between stations (other than between Suburban Station and 30th Street Station) on the line is 1.7 miles, between Paoli and Malvern. The maximum distance is 23.6 miles, between Parkesburg and Lancaster. The average distance is 7.9 miles.[5]

The involved buses operate a total of 24.7 miles within the York SMSA, serving the two termini and five intermediate communities. The minimum distance between the communities served is 1.2 miles, between Columbia and Wrightsville; and the maximum distance is 7.2 miles, between Lancaster and Mountville. The average distance is 4.1 miles.

The population figures for the respective standard metropolitan statistical areas through which the involved rail and substituted-bus-for-rail service is performed, along with their size and the counties which comprise them, are as follows: (1) Philadelphia SMSA, consisting of Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties, Pa., and Burlington, Camden, and Gloucester Counties, N.J., has a population of 4,850,000 and an area of 3,553 square miles; (2) Lancaster SMSA, consisting of Lancaster County, Pa., has a population of 303,000 and an area of 946 square miles; (3)

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[5] In addition to serving the termini and eight of the intermediate stations, train No. 601 serves the following local (Philadelphia) stations which have not been considered in computing the average distance between stations: 52d Street Station, Overbrook, Narberth, Bryn Mawr, Rosemont, Wayne, and Berwyn. The 30th Street Station, however, has been considered inasmuch as it is a scheduled stop for all of the 600-series trains.

Harrisburg SMSA, consisting of Cumberland, Dauphin, and Perry Counties, Pa., has a population of 403,500 and an area of 1,624 square miles; and (4) York SMSA, consisting of Adams and York Counties, Pa., has a population of 323,500 and an area of 1,435 square miles. The 1960 and 1970 population figures for the communities along the Philadelphia—Harrisburg and Lancaster—York routes are set forth in appendix B hereto.

The seven substituted-bus-for-rail schedules between Lancaster and York are set forth in appendix C along with the designated trains with which connections prior to May 1, 1971 could have been made by passengers traveling to and from Philadelphia or points north thereof. As hereinafter noted, certain of these connecting trains have been discontinued effective May 1, 1971.

In 1930, there were two through trains operated by Penn Central's predecessor, hereinafter called Railroad, between Philadelphia and York, in addition to other connecting rail service. Eastbound train No. 5504 departed York at 6:18 a.m. and arrived in Philadelphia at 8:52 a.m. Westbound train No. 5505 departed Philadelphia at 6:55 p.m. and arrived in York at 8:33 p.m. Included in the regular consist was a buffet-parlor car. As of February 1952, this route was still an all-rail route in each direction; the train then consisted of a self-contained, self-propelled diesel electric car, with a capacity of 66 passengers, which operated between Lancaster and York, a distance of 24.7 miles, and made connections at Lancaster.

As of November 9, 1953, PUC authorized discontinuance of the rail passenger service between York and Lancaster[6] and the institution by Pennsylvania Greyhound Lines, Inc. (Greyhound), of a substituted-bus-for-rail service following substantially identical rail schedules and with identical intermediate stops. The PUC's order of May 30, 1952, which authorized the substituted service on a temporary basis described the buses to be used on this route as modern, intercity, air-conditioned, highway coaches with reclining seats.

On January 14, 1963 PUC authorized Conestoga Transportation Company (Conestoga) to perform the substituted-bus-for-rail service, in intrastate commerce, between York and Lancaster pursuant to an agreement with Railroad. Greyhound then discontinued its local service which had become unprofitable due to the necessity of deadheading the requisite equipement to York and Lancaster from its

[6]Docket No. 78915, *Dessie Sherwood et al. v. Pennsylvania Public Utilities Commission and Pennsylvania Railroad Company*; affirmed *Sherwood, Appellant v. Pennsylvania Public Utility Commission*, 177 Pa. Superior Court 6, (1954).

Harrisburg terminal; however, it still performs the long-distance overhead service to and from these two termini. Conestoga, with the support of Railroad, received temporary authority from this Commission to perform such operations in interstate commerce on April 1, 1963, and permanent authority in certificate No. MC-61799 (Sub-No. 1), dated February 6, 1964. In his report of hearing authorizing the permanent authority, the hearing examiner described the bus in which the proposed service would be performed:

> As at present, in the performance of the proposed service, applicant will utilize a 41-passenger motor coach, air conditioned and equipped with reclining seats and compartments beneath the coach for accomodation of baggage and mail.

The evidence indicates that the average daily rail revenue passengers transported on each of the seven buses are 3.4.[7] about 730 rail revenue passengers rode the involved buses during March 1971, and 800 during December 1970. Penn Central sells tickets to be utilized on the Conestoga bus schedules involved herein; and these tickets are confined to Lancaster and York or the intermediate points. The routings[8] and fares[9] are included in Penn Central's tariff on file with this Commission. Effective September 1, 1970, Penn Central's fares for the substituted-bus-for-rail transportation between York and Lancaster are $1.45 for coach fare and $2.50 for first class fare. Its corresponding fares previously were $1.18 and $2.13, respectively, effective June 1, 1963.

Conestoga has its fares on file with this Commission for bus service between points identical to those served by the involved substituted-bus-for-rail schedules;[10] and since February 1, 1964, the fare between York and Lancaster has been $1.18. The record herein does not indicate whether the bus and rail passengers are transported on the same bus at the same time, but Penn Central's fares and routing are restricted to the involved substituted-bus-for-rail schedules..

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[7] The average revenue rail passengers per day for each of the seven buses during March 1971 were as follows: Bus No. 0552-3.6 passengers; Bus No. 0553-3.4 passengers; Bus No. 0557-3.6 passengers; Bus No. 0558-3.1 passengers; Bus No. 0559-4.7 passengers; Bus No. 0560-4.8 passengers, and Bus No. 0572-0.4 passengers.

[8] Item 7, Penn Central and Conestoga Transportation Company; Joint Rail-Motor Routing and Honoring Passenger Tariff No. 12, General Passenger Committee—Eastern Railroad Tariff Bureau, I.C.C. P-19, effective February 1, 1971.

[9] Pennsylvania Railroad Series, I.C.C. No. A-27121, as increased by Master Table Tariff No. 40, I.C.C. F-14, issued by Tariff Executive Association—Eastern Railroads, agent.

[10] Conestoga Transportation Company's Tariff, MP-I.C.C. No. 8; Local Passenger Tariff Naming Fares and Rules and Regulations For the Transportation of PERSONS Between Lancaster, Pennsylvania, Serving Intermediate Points of Mountville, Columbia, Wrightsville, Strickler, and Hellam, Pa.

The 600-series trains were instituted December 5, 1965. When its attempts to discontinue the predecessor trains to the 600 series were unsuccessful, Railroad negotiated with the City for the lease of three Silverliner cars for use between Harrisburg and Philadelphia. At one time, these predecessor trains had been a part of intercity trains operating between the Midwest and New York, N.Y., hauling mail cars, coaches, pullman cars, dining cars, et cetera.[11] Subsequently, the predecessor trains were separated from the long-distance trains at Harrisburg; and they were operated to and from Philadelphia. They consisted of three round trip schedules between Harrisburg and Philadelphia: one during the morning "rush" hour, one during the evening "rush" hour, and one after the evening "rush" hour. In addition, Railroad operated a single round trip commuter schedule between Harrisburg and Lancaster and three round trip commuter schedules between Philadelphia and Parkesburg.[12]

After its successful negotiations with the City for the lease of the three Silverliners, Railroad consolidated its Lancaster-Harrisburg, Philadelphia-Parkesburg, and Harrisburg-Philadelphia operations into a series of through runs between Harrisburg and Philadelphia. This became the Harrisburg service. Railroad was then able to perform all three operations with only three Silverliners whereas previously it had utilized eight or nine cars, of which six were the so-called Pioneer cars, the prototype cars of the Silverliners. This resulted in a savings to Railroad and a far superior rail service to the passengers. Within a relatively short period of time, however, the number of daily passengers utilizing the 600-series trains on weekdays increased to approximately 1,200 riders, thus requiring a second Silverliner to be added to certain "rush" hour trains. Patronage on the 600-series trains has increased approximately 20 percent in each of the 5 years since service was inaugurated, for a total of 100 percent.

The 600-series trains consist of eight weekday trains in each direction, four eastbound and three westbound trains on Saturdays, and 3 trains in each direction on Sundays and holidays. The trains, consisting of one to three cars, operate between Penn Center (Suburban Station) in Philadelphia and Harrisburg, a distance of 103.2 miles. All of these trains stop at Philadelphia's 30th Street Station, but none of them serve the North Philadelphia Station.

[11]Even though some of these trains operated during "rush" hours, passengers often found them unreliable for commuting purposes.

[12]At that time, Railroad also operated 38 trains between Paoli and Philadelphia (the Paoli service). At present Penn Central operates 72 trains in the Paoli service and 39 trains between Philadelphia and Bryn Mawr.

Attached hereto as appendix D are the 17 schedules which comprise the Harrisburg service. Train No. 601 covers the distance between the two termini in 2 hours and stops at 16 intermediate (and local) stations while train No. 605 covers the distance in 1 hour and 42 minutes, and stops at only 6 intermediate stations. On an average the 600-series trains cover the distance in 1 hour and 47 minutes, and stops at 7.5 intermediate (or local) stations. Connecting trains to and from New York City for passengers utilizing the Harrisburg service are set forth in appendix E attached hereto. While no feeder revenues were introduced, the evidence tends to indicate that about 8 percent of the passengers who utilize the Harrisburg service avail themselves of the connecting service to and from New York City.

Prior to May 1, 1971, Penn Central operated an additional seven eastbound and six westbound trains between Harrisburg and Philadelphia. However, all of these trains originated or terminated at points west of Harrisburg, namely, Pittsburgh, Chicago, or St. Louis, and all but one pair of trains originated or terminated at New York City (trains Nos. 24 and 33 originated and terminated at Philadelphia's 30th Street Station). These 13 trains, with the exception of trains Nos. 24 and 33, served only North Philadelphia, and did not serve 30th Street or Penn Center (Suburban Station). Effective May 1, 1971, Penn Central discontinued its responsibility for these 13 trains (trains Nos. 16, 24, 22, 4, 48, 50, 54, 25, 33, 23, 31, 49, and 55); however, Amtrak assumed the operation of only 6 of them. (Trains Nos. 4, 31, 16, 25, 48, and 49.) Amtrak also added an additional pair of trains, between Suburban Station in Philadelphia and Harrisburg, trains Nos. 618 and 633, to substitute for the former trains Nos. 54 and 33.

The 600-series trains consist of Silverliner cars, which are lightweight, self-propelled, electric cars with a specified speed of 85 miles an hour, and which are able to maintain an average speed of 75 miles an hour. Generally, the Silverliners have a seating capacity of from 122 to 125 passengers, which is 50 percent (or more) greater than the seating capacity of the average long-distance intercity passenger coach. Some Silverliners have five seats across the width of the car: a triple seat on one side of the narrow off-centered aisle, and a double seat on the other side of the aisle. Other Silverliners have double seats on each side of the aisle. The seats do not recline; and they do not have footrests or armrests (except armrests on the aisle seats). They do not have the contouring such as the reclining seats on the long-distance intercity coach cars have. They are strictly straight-back seats with some padding. Some Silverliners have reversible

seats; others do not. On the whole, seats are very close together and take up the distance from one end of the car to the other, except for the space required for the air-conditioning units (one on each end of the car), a drinking water machine, and a very small toilet compartment. No food or beverage is available on the 600-series trains. The luggage rack above the seats is the type which accommodates only small attache cases, small and light packages, and hats and coats. In single-car trains, a large sign prominently displayed indicates that one-half of the car is for nonsmokers only.

The City owns a total of 75 Silverliners,[1] 58 of which it has leased for a 25-year period to Penn Central for use (hereinafter called contract service) within the Philadelphia area, namely on the following lines: (1) between Trenton, N.J., and Philadelphia (the Trenton service); (2) between Chestnut Hill, Pa., and Philadelphia (the Chestnut Hill service); and (3) between Manyunk, Pa., and Philadelphia (the Manyunk service). Twenty of the 58 cars have been manufactured by the St. Louis Car Company and the remainder by The Budd Company. All of the 58 cars generally seat from 122 to 125 passengers; are equipped with radio communications; and 39 are lavatory equipped. Except for Friday afternoon and evenings when seven cars are required, the Penn Central utilizes five cars in the Harrisburg service, and all of these cars are lavatory equipped.

Silverliners can be operated only singly or coupled to one another because they accelerate and decelerate at a much faster rate than other cars. They cannot be operated west of Penn Central's electrified system at Harrisburg, and are only used very infrequently in the New York-Washington service.

Pursuant to the terms of the lease with the city, these 58 Silverliners are to be assigned in contract service; however, Penn Central is allowed to utilize these cars in noncontract service provided they are not needed in contract service, and provided further that the cars originate, terminate, or pass through Philadelphia. For this privilege, Penn Central pays the City $60,000 annually, which sum is over and above the annual lease payment. The 58 cars are utilized as follows: 3 cars are based in New York City for use between New York City and Philadelphia (the New York City service); 4 are based in Paoli for use between Paoli and Philadelphia (the Paoli service); 5 are based in Media, Pa., for use between Media and Philadelphia (the Media service); 2 are based in Wilmington,

[1] Penn Central presently owns five Silverliner type cars which were the prototype or so-called Pioneer cars; however, these cars are not compatible with the Silverliners inasmuch as they cannot be coupled with the Silverliners; nor do they maintain the speeds of the Silverliners.

Del., for use between Wilmington and Philadelphia (the Wilmington service); 20 cars are used in the Chestnut Hill service; 14 cars are used in the Trenton service; 5 cars are normally used in the Harrisburg service; and 5 cars are kept in a pool to back up the other 53 cars, and to provide the extra 2 cars required during Friday afternoon and evening in the Harrisburg service.[14] From Monday through Thursday, the five cars in the Harrisburg service are fully utilized during morning and afternoon peak periods; their utilization slackens off greatly throughout the rest of the day.

As hereinbefore mentioned, the Harrisburg service is performed by Penn Central under a contract with SEPTA which has certain funds made available to it from the City, the Commonwealth, and certain counties, for contribution toward commuter and suburban rail passenger service within and around the Philadelphia metropolitan area. The City contributes annually approximately $2,666,667, of which 10 percent is budgeted by SEPTA for administrative expenses; about $750,000 annually is contributed by Chester, Bucks, Delaware, and Montgomery Counties, Pa.; and the Commonwealth contributes annually approximately $7 million. The Reading Railroad System receives part of these funds for its portion of the rail passenger service performed within and around the Philadelphia metropolitan area.

The schedules and fares pertaining to the Harrisburg service have been set up by mutual arrangements between SEPTA and Penn Central, and are subject to the approval of PUC. In effect, the City contracts with its nonprofit corporation, Passenger Service Improvement Corporation (PSIC), which contracts with SEPTA which, in turn, contracts with Penn Central; and the latter must obtain the approval of PUC on its changes in its schedules, fares, and service.

In 1958 the commuter trains operating within the Philadelphia metropolitan area were basically utilizing only two types of tickets: a one-way ticket at a reduced price, and a 10-trip ticket sold for the riders' convenience at a half-cent discount. Subsequently, due to the

[14] In emergencies or during heavy holiday traffic requiring additional cars, rather than provide cars in need of repairs or an insufficient number of cars, Penn Central, under the lease arrangements hereinbefore described, will utilize on its New York City-Washington, D.C. runs, one or more of the Silverliners in front of the long-distance train in order to siphon off the short-haul travel and to save the more comfortable reclining seats on the coaches, the dining cars, and other facilities for the passengers traveling the longer distance. Normally, the New York-Washington passengers require the more affluent type of car: more leg room, footrests, armrests, reclining seats, higher-backed seats, and wider aisles. They require bigger and more comfortable seats than the travelers only going a short distance.

experience gained by Railroad, SEPTA, the City, and the suburban counties from various federally-funded rail demonstration projects, it was concluded that the basic fare structure should be comprised of four types of tickets:[15] (1) the one-way coach ticket (regular ticket), which is used chiefly by the infrequent rider during the rush hour; (2) the bargain one-way coach ticket (bargain ticket), which is used by all knowledgeable riders when utilizing the 600-series trains other than during the stated restricted times;[16] (3) the calendar month individual ticket (monthly ticket), which is a flash type ticket used chiefly by the more affluent and prestigious riders who do not like the inconvenience of waiting in line at the ticket window, and who will utilize the ticket for approximately 21 round trips monthly; and (4) the 10-trip ticket, 2-month bearer ticket (multiple ticket), which is used by the frequent rider chiefly during that portion of the rush period when the bargin ticket is not accepted.

During 1970, 79.5 percent of the revenue passengers on the 600-series trains utilized reduced-fare type tickets: 47.4 percent used either the monthly or the multiple tickets, hereinafter referred to collectively as commutation tickets, and 32.1 percent utilized the bargin tickets: only 20.5 percent of the revenue passengers during 1970 used the regular tickets or those specified in footnote 14 (except the pass tickets). For the seven Penn Central routes in the Philadelphia metropolitan area, however, the ticket breakdown is as follows: regular tickets-13 percent; bargain tickets-35 percent; monthly tickets-7 percent; and the multiple tickets-44 percent. Set forth herein as appendix F is the fare table in effect prior to May 1, 1971, for the four basic type tickets between Philadelphia and the communities west of Paoli (including Paoli) which are served by the 600-series trains. As reflected therein, the commutation tickets represent a considerable savings over the regular ticket when used by those passengers traveling to and from work with a high degree of regularity. However, the bargin ticket, when used during the nonrestricted times, represents an even greater savings than the multiple ticket. Because of this, many revenue passengers will utilize a multiple ticket into Philadelphia in the morning rush period and, if returning after 6 p.m., will utilize a bargain ticket on the return. The

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[15] Other type tickets utilized by patrons on this route are as follows: family plan; party plan; "pass" or free tickets; furlough tickets; and "clergy" tickets.

[16] The bargain ticket is good into Philadelphia on all trains arriving Penn Central Station—30th Street—AFTER 9:30 a.m. *** BUT NOT GOOD on trains arriving BETWEEN 2 a.m. and 9:30 a.m. From Philadelphia, the bargain ticket is good on all trains EXCEPT those scheduled to leave Penn Central Station—30th Street—BETWEEN 2 a.m. and 9:30 a.m. (for tickets to Paoli and east) or BETWEEN 4:30 p.m. and 6 p.m. (for tickets to all stations).

bargain ticket is always available for use by residents of Lancaster and points west thereof when commuting to and from their place of employment in Harrisburg inasmuch as the restrictions against the use of such tickets are not applicable to such commuters utilizing trains Nos. 601, 610, and 612. Of course, students not qualifying for reduced fares, shoppers, and other frequent riders will utilize the bargain ticket over the regular ticket or the multiple ticket if traveling during the nonrestricted times.

Seven of the 16 weekday trains operate within the peak period times of the day. These seven trains are as follows:

Train No.	Departure		Arrival	
600	Harrisburg	5:41 a.m.	Philadelphia	7:33 a.m.
602	do	6:50 a.m.	do	8:38 a.m.
601	Philadelphia	5:45 a.m.	Harrisburg	7:45 a.m.
610	Harrisburg	4:25 p.m.	Philadelphia	6:10 p.m.
612	do	5:25 p.m.	do	7:18 p.m.
611	Philadelphia	5:27 p.m.	Harrisburg	7:19 p.m.
613	do	6:20 p.m.	do	8:05 p.m.

The on-off passenger count for the week of November 15-21, 1970, set forth in appendix G hereto, indicates that, on the average weekday, the bulk of the revenue passengers riding trains Nos. 600 and 602 eastward from Harrisburg entrain at Lancaster and points east thereof and detrain in Philadelphia: (1) of the 318 revenue passengers on train No. 600, 280 entrained at Lancaster and points east thereof, and 290 detrained in Philadelphia; and (2) of the 251 revenue passengers on train No. 602, 222 entrained at Lancaster and points east thereof, and 227 detrained in Philadelphia. This study also reflects that of the 147 revenue passengers riding train No. 601 westbound, 70 entrain at Lancaster or points west thereof, and 84 detrain at Harrisburg. In addition, the study indicates (a) that the two trains westward from Philadelphia (trains Nos. 611 and 613) during the peak evening period carry a high percentage of revenue commuters who detrain at Lancaster and points east thereof;[17] and (b) that the two trains eastward from Harrisburg (trains Nos. 610 and 612) during the peak evening period carry a high percentage of revenue commuters who detrain at Lancaster or points west thereof.[18] While the evidence indicates that a considerable number of

[17] Of the 451 daily passengers riding train No. 611 on an average weekday, 420 entrain in Philadelphia and 416 detrain at Lancaster or points east thereof; and of the 149 passengers on train No. 613 each weekday, 143 entrain in Philadelphia and 132 detrain at Lancaster or points east thereof.

[18] Of the 154 daily passengers riding train No. 610 on an average weekday, 65 entrain at Harrisburg and 25 detrain at Lancaster or a point west thereof; and of the 70 passengers on train No. 612 each weekday, 54 entrain at Harrisburg and 38 detrain at Lancaster or points west thereof.

rail employees commute either to work, from work, or both ways on "pass" or free tickets, no figures or percentages on these commuters were developed for the record. There are indications, however, that effective June 1, 1971, Amtrak requires rail employees riding the Amtrak trains, including the 600 series, to pay half fare.

As reflected more specifically in appendix G hereto, the average number of weekday passengers utilizing the 600-series trains daily during the test period November 16-20, 1970, were 2,337;[19] of this number 1,540 or 65.5 percent of the passengers utilized the aforementioned seven peak period trains. These peak period trains operate with from 1 to 3 cars, whereas the other trains usually operate with only a single car.

The deputy commissioner of the City's Department of Public Property testified that the 600-series trains "are operated for the commuter peaks in Philadelphia and Harrisburg and they run all day in between in order to get the equipment back and forth, where it will be strategically located for the next return movement, and also to follow our policy of utilizing our investment in public transportation as economically as possible." In further explanation, he stated:

> We have found that the losses on commuter service are less when you run all day than when you limit the service just to rush hour, so that this service has been built up to make the maximum contribution to its own expense.
>
> *** so that by moving the trains back and forth rapidly like this, it is possible to limit the service to five cars; if the trains were reduced in number, we would then have to apply more, rather than less, cars, due to the rapid cycling which takes place.

An analysis of Penn Central's latest from-and-to passenger study, covering revenue passengers utilizing the 600-series trains during the week of May 18-24, 1969, indicated that a total of 10,148 passengers rode these trains during this 1-week period and that 5,228 or 51.5 percent of them utilized commutation tickets. In addition, this study reflected that 1,137 passengers or 11.0 percent of the total revenue patronage were commuters between the two termini.

For the aforesaid seven peak period trains, the numbers and percentages of passengers utilizing commutation tickets during the May 18-24, 1969, study period are as follows:

> (a) Of the 1,004 passengers riding train No. 600, Monday through Friday (May 19-23, 1969), 796 passengers or 79.3 percent utilized commutation tickets. Bargain tickets cannot be used on this train.
>
> (b) Of the 1,192 passengers riding train No. 602, Monday through Saturday (May 19-24, 1969), 885 passengers or 74.3 percent utilized commutation tickets. Bargain tickets can be used on this train *only* on Saturdays.

[19] The total number of passengers during the 7-day period was 12,474.

(c) Of the 428 passengers riding train No. 601, Monday through Friday May 19-23, 1969), 278 passengers or 65.0 percent utilized commutation tickets.[20] Bargain tickets can be used by passengers destined to Dowingtown and points west thereof.

(d) Of the 638 passengers riding train No. 610, Sunday through Friday (May 18-23, 1969), 135 passengers or 21.2 percent utilized commutation tickets. Bargain tickets can be used on this train.

(e) Of the 305 passengers riding train No. 612, Sunday through Saturday (May 18-24, 1969),[21] 132 passengers or 43.3 percent utilized commutation tickets. Bargain tickets can be used on this train.

(f) Of the 2,255 passengers riding train No. 611, Monday through Friday (May 19-23, 1969), 1,859 passengers or 82.4 percent utilized commutation tickets. Bargain tickets cannot be used on this train.

(g) Of the 632 passengers riding train No. 613, Monday through Friday (May 19-23, 1969), 278 passengers or 44.0 percent utilized commutation tickets. Bargain tickets can be used on this train.

The blocks of patrons utilizing the Harrisburg service, in order of their size, are as follows: (1) those residents of Lancaster and points east thereof who commute into Philadelphia in the morning and return to their homes in the evening; (2) the regular passengers (professional men, business men, and couriers) going from Philadelphia to the capital (Harrisburg) on business with or before the legislature, executive departments, or the State regulatory agencies and offices, and returning in the afternoon; (3) the riders coming into Philadelphia to shop, visit, or for scheduled appointments, and returning that same afternoon or evening; (4) those residents of Lancaster and points west thereof who commute to work in Harrisburg in the morning and return to their homes in the evening;[22] and (5) the passengers who commute on weekends, including young ladies traveling to and from college and workers who go home on Friday afternnon or evening to be with their families and return on Sunday night in order to be back on the job Monday morning.

Discussion and Conclusion

Our order of May 6, 1971, directed Penn Central to make available at the hearing competent witnesses for examination with respect to

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[20] Of these 278 passengers utilizing commutation tickets on train No. 601, 201 of them commuted to Harrisburg from the following points: from Lancaster-101 passengers; from Mount Joy-21 passengers; from Elizabeth-44 passengers; and from Middletown-35 passengers. The restrictions against the use of the bargain tickets are inapplicable to these commuters.

[21] The from-and-to passenger study indicates that train No. 612 operated daily; however, the existing schedules indicate that train No. 612 operates only Monday through Friday (except holidays).

[22] There is no regularly scheduled certificated bus service between Lancaster and Harrisburg.

the nature of the service provided by the involved buses and the trains under the criteria of the Amtrak Statute and *Penn Central Transp. Co. Discontinuance* (the *Penn Central* case), 338 I.C.C. 318 (1971), to the extent applicable.

In the *Penn Central* case, we discussed the legislative history of the Amtrak Statute and elaborated on the statutory mandates contained in section 102(5). We set forth in that decision certain criteria, some or all of which we found would have a bearing on the issue of whether a particular train operation reflects "commuter or other short-haul service" in nature. They are as follows:

(1) The passenger service is primarily being used by patrons traveling on a regular basis either within a metropolitan area or between a metropolitan area and its suburbs;

(2) The service is usually characterized by operations performed at morning and evening peak periods of travel;

(3) The service usually honors commutation or multiple-ride tickets at a fare reduced below the ordinary coach fare and carries the majority of its patrons on such a reduced fare basis;

(4) The service makes several stops at short intervals either within a zone or along the entire route;

(5) The equipment used may consist of little more than ordinary coaches;

(6) The service should not extend more than 100 miles at the most, except in rare instances; although service over shorter distances may not be commuter or short haul within the meaning of the exclusion.

On joint brief, numerous parties[23] request that we reconsider our order of May 6, 1971, and delete all reference to the criteria specified in the *Penn Central* case. We have reconsidered our order of May 6, 1971, and hereby deny that request. We are aware that the underlying factual findings necessarily are different in the *Penn Central* case than in the subject proceeding; however, insofar as the criteria set forth in the *Penn Central* case can be utilized to determine whether the involved transportation is "intercity rail passenger service" within the meaning of section 102(5) of the Amtrak Statute, we believe they are applicable and should be discussed.

For the reasons hereinafter given, we view the involved Penn Central rail service between Philadelphia and Harrisburg as "commuter and other short-haul" in nature; and the substituted-bus-for-rail service between Lancaster and York as motor passenger service and not "intercity rail passenger service."

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[23] Commonwealth, PUC, City, and Brotherhoods.

600-SERIES TRAINS

In the *Penn Central* case we noted that commuters using the "west end" service around New York City and those commuting between New York City and Pennsylvania points travel for periods up to 2 hours and for distances of 100 miles. In our consideration of the sixth guideline, the one with which we shall begin our discussion here of the 600-series trains, we find the distance between the involved termini is 103.2 miles, or 3.2 miles over the 100-mile limitation set forth in the *Penn Central* case. On the other hand, the average traveling time between Harrisburg and Philadelphia's Suburban Station is 1 hour and 47 minutes. Only train No. 601 which makes 16 stops between the termini takes 2 hours to cover the distance. We believe, however, that the involved train service comes within an allowable exception respecting distance, and is easily explained by the existing commuter patterns and by past rail passenger operations. In 1965 Railroad, in a move to reduce expenses, leased three Silverliners from the City and, in effect, incorporated two separate commuting services into its Harrisburg-Philadelphia operations by establishing a series of through-run trains covering the peak periods. Previously, Railroad operated a round trip commuting service between Harrisburg and Lancaster and several round trip schedules for commuters between Parkesburg (and points east thereof) and Philadelphia. These two commuter operations and the Harrisburg-Philadelphia operations previously required 8 or 9 cars. Combining the two commuter services into an end-to-end operation allowed Railroad to save cars, to reduce expenses, and to increase passenger revenues. The existing schedules and the various passenger studies (see appendixes D and G) indicate that trains Nos. 601, 610, and 612 are Harrisburg area commuter trains, and that trains Nos. 600, 602, 611, and 613 are Philadelphia area commuter trains. Commuters from Lancaster and points west thereof ride train No. 601 into Harrisburg in the morning and either trains Nos. 610 or 612 home in the evening. Train No. 601 departs Lancaster at 7:07 a.m. and arrives in Harrisburg at 7:45 a.m. Trains Nos. 610 and 612 depart Harrisburg at 4:25 p.m. and 5:25 p.m., respectively, and arrive in Lancaster at 4:48 p.m. and 6:07 p.m., respectively. There is no regularly scheduled certificated bus service between Harrisburg and Lancaster. The Philadelphia commuters who reside in Lancaster and points east thereof ride either trains Nos. 600 or 602 into Philadelphia in the morning, and either trains Nos. 611 and 613 home in the evening. Trains Nos. 600 and 602 depart Lancaster at 6:15 a.m. and 7:22 a.m.,

respectively, and arrive in the Suburban Station at 7:33 a.m. and 8:38 a.m., respectively. Trains Nos. 611 and 613 depart Suburban Station at 5:27 p.m. and 6:20 p.m., respectively, and arrive at Lancaster at 6:45 p.m. and 7:32 p.m., respectively. In view of the aforementioned, we conclude that we have here back-to-back commuter operations joined at Lancaster: Philadelphia area commuter operations extending westward to Lancaster and covering 67.9 miles, and the Harrisburg area commuter operations extending eastward to Lancaster and covering 35.3 miles. While 11 percent of the total riders travel between Harrisburg and Philadelphia and add considerably to the passenger revenues, we do not believe that this fact alters what is essentially back-to-back commuter operations. Accordingly, the involved distances are within our sixth criteria.

Turning next to the first criteria listed above, we believe that the commuters within either the Philadelphia area or the Harrisburg area patronize their respective commuter service primarily on a regular basis, from and to their suburban residences and their metropolitan destinations, and that such use has increased considerably since the 600-series trains were instituted on December 5, 1965. Initially, only about 1,200 passengers patronized these trains on an average weekday; however, now there are approximately double that number of commuters. This represents a hundred percent increase in a 5-year period. During the week of May 18-24, 1969, 10,305 passengers rode the 600-series trains; 18 months later, according to the on-off passenger study of November 15-21, 1970, the weekly revenue passengers had increased to 12,474. In addition, the study of May 18-24, 1969, reflects that on the seven peak period trains, a high percentage of the passengers utilize commutation tickets, especially on those peak period trains whereon bargain tickets cannot be used (trains Nos. 600, 602, and 611).

We note that Harrisburg, Lancaster, and Philadelphia are listed by the Bureau of the Census as three separate but contiguous standard metropolitan statistical areas. The exclusion set forth in section 102(5)(A) of the Amtrak Statute, in this respect, exempts from its application "commuter and other short-haul service in metropolitan and suburban *area* ***." [Emphasis supplied.] The express language of the statute thus indicates that "commuter and other short-haul service" could reflect an operation extending beyond a metropolitan area to another metropolitan area as is the case herein, bearing in mind that the exempted service is "usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations ***." These factors, too, are present

herein as next discussed. In these circumstances, it is apparent that the first criteria set forth in the *Penn Central* case too narrowly construed the scope of the exclusion in section 102(5)(A) and should be modified consistent with our views just expressed herein in determining whether or not the factual circumstances of a given railroad passenger service fall within the exclusion of the Amtrak Statute. Accordingly, we conclude that under our first guideline, as modified here, the involved rail service reflects "commuter or other short-haul service."

Viewing the overall operations of the 17 600-series trains, we conclude that the majority of the passengers patronize the seven peak period trains: trains Nos. 600, 601, and 602 which operate in the morning peak period, and trains Nos. 610, 611, 612, and 613 which operate during the evening peak period. The riders on these seven trains represent 65.9 percent of the total weekday patronage. The remaining 9 weekday schedules allow for the movement of the equipment back and forth between the termini in order that it will be properly located for the next needed return movement; and at the same time this nonpeak period rail transportation makes a contribution to the commuter operations without adding corresponding increases in the cost of operating these Silverliners. There is evidence of record to indicate that if only the peak period trains were operated, additional equipment would be needed inasmuch as sufficient cars frequently would not be in the appropriate terminal for the return movement. Other evidence indicates that losses on the commuter service are minimized when the 5 Silverliners are operated all day than when they are limited to just the peak periods. The peak period trains operate with from one to three cars, whereas the other trains usually operate with only a single car. Accordingly, we conclude that our second guideline indicates the operation to be commuter.

The next guideline relates to the availability and use of commutation or multiple-ride tickets at fares below the ordinary coach fare. As hereinbefore noted, the bargain ticket, the monthly ticket, and the multiple ticket when regularly used are all below the cost of the ordinary coach ticket (regular ticket) and that knowledgeable and frequent commuters seldom utilize the regular ticket. During 1970, 79.5 percent of the revenue passengers on the 600-series trains utilized the reduced-fare type of ticket: 47.4 percent used either the monthly ticket or the multiple ticket, and 32.1 used the bargain ticket. Only 20.5 used the regular tickets or one of the other type tickets (except the pass tickets). The May 18-24, 1969 study reveals that during this

7-day test period 51.5 percent used the commutation tickets. Hereinbefore we noted that the bargain ticket which can be used only during the nonrestricted time represents an even greater savings than the multiple ticket, and that on several of the peak period trains the bargain ticket is available for use by the regular commuter. For instance, Lancaster residents commuting to and from work in Harrisburg can use the bargain ticket on any of the three peak period trains (trains Nos. 601, 610, and 612). Philadelphia commuters going home in the evening on train No. 613 likewise can utilize the bargain ticket; such commuters would use a multiple ticket going to work and a bargain ticket on the return. The Philadelphia area-wide ticket breakdown indicates that 44 percent utilize the multiple ticket; 35 percent, the bargain ticket; 7 percent, the monthly ticket; and 13 percent, the regular ticket. Under this criterion—the reduced fare basis—the commutation character of the involved rail service is apparent.

The trains in question, other than train No. 601, make from 5 to 12 intermediate stops, with the average number of stops being 7.5; and they make these stops at intervals ranging from 1.7 to 23.6 miles apart, with the average distance between these stops being 7.9 miles. Train No. 601 serves a total of 16 intermediate stations, a number of them being local stations within Philadelphia which are not served by any of the other 16 trains. The equipment used by Penn Central in this service consists of five Silverliners except during the Friday afternoon and evening "rush" hour when seven cars are required. These cars are lightweight, self-propelled, electric cars with high seating capacity. The cost to operate and maintain them is low compared to intercity equipment; and they have quick turnaround times. Accordingly, we conclude that the equipment utilized and the number of stations served at relatively short intervals are consistent with the "commuter and other short-haul" service under our fourth and fifth criteria.

From the above discussion, it is apparent that the 600-series trains provide a commuter-type as opposed to an intercity-type service, and we so conclude. Accordingly, the involved rail service falls within the exclusion of section 102(5) and is not "intercity rail passenger service" within the meaning of section 102(5) of the Amtrak Statute.

THE SUBSTITUTED-BUS-FOR-RAIL SERVICE

The Amtrak Statute does not make any direct or indirect reference to the inclusion of substituted-bus-for-rail service. Likewise, our review

of the legislative history of the statute does not uncover any such references; nor has any of the parties directed our attention to any portion of the statute or its legislative history which would be definitive of Congress' intent. Accordingly, if substituted-bus-for-rail service is found to be included in the Amtrak Statute, we must glean Congress' intent to so include it by indirect reference.

The full preamble to the Amtrak Statute is as follows:

> To provide financial assistance for and establishment of a national rail passenger system, to provide for the modernization of railroad passenger equipment, to authorize the prescribing of minimum standards for railroad passenger service, *to amend section 13a of the Interstate Commerce Act*, and for other purposes. [Emphasis ours.]

Section 401(a)(1) of the Amtrak Statute authorized a railroad to discontinue all of its intercity rail passenger service upon entering into a contract with Amtrak under certain specified conditions including the following:

> Provided, That any railroad *discontinuing a train* hereunder must give notice in accordance with the notice procedures contained in *section 13a(1) of the Interstate Commerce Act*. [Emphasis ours.]

Penn Central gave notice under section 401(a)(1) of the Amtrak Statute and section 13a of the Interstate Commerce Act concerning the discontinuance of the involved bus and rail service. However, a section 13a notice may only embrace trains and ferries. See *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963). Nothing in the legislative history indicates that if substituted-bus-for-rail service was intended by Congress to be included in the Amtrak Statute, discontinuance of such service could be effected without any notice to the public.

Further indication that Congress did not include substituted-bus-for-rail service in the Amtrak Statute can be found in section 401(a)(3)(B) where a railroad is permitted to compute its payments to Amtrak on the basis of intercity service over the routes between those points between which the Secretary of Transportation has specified that intercity passenger trains shall be operated. In his final report issued January 28, 1971, the Secretary of Transportation did not include any bus service or substituted-bus-for-rail service as being within the contemplation of sections 201 and 202 of the Amtrak Statute.

We conclude from the aforementioned that it was Congress' intent not to include a substituted-bus-for-rail service within the ambit of

the Amtrak Statute. Accordingly, Penn Central's notice under sections 401(a)(1) of the Amtrak Statute and 13a of the Interstate Commerce Act is ineffective. While PUC authorized Railroad to discontinue the Lancaster-York rail service in 1953, it did not certificate Railroad to perform the substituted-bus-for-rail service. Instead it first certificated Greyhound to perform this service; and then in 1963 it certificated Conestoga to perform the service and authorized Greyhound to discontinue its previously authorized service. In effect, the involved substituted-bus-for-rail service is, and has always been, performed pursuant to a motor carrier certificate issued to a motor carrier of passengers. PUC authorized the bus operations in intrastate commerce and this Commission, in interstate commerce. Should Conestoga desire to discontinue its operations or any portions thereof, it may seek revocation of its respective certificate before the PUC and this Commission.

Contentions of the parties not specifically discussed herein have been considered and found without material significance or not necessary for a disposition of this proceeding.

FINDINGS

We find that the substituted-bus-for-rail service between Lancaster and York is motor passenger operations and therefore not "intercity rail passenger service" within the meaning of section 102(5) of the National Railroad Passenger Service Act of 1970.

We also find the 600-series trains are "commuter and other short-haul" and therefore not "intercity rail passenger service" within the meaning of section 102(5) of the National Railroad Passenger Service Act of 1970.

No order is necessary. Our findings and conclusions herein shall be forwarded to the United States District Court for the Eastern District of Pennsylvania pursuant to the court's request.

CHAIRMAN STAFFORD, concurring:

It is only after some hesitation that I concur in the majority's decision. This is because the finding that the Harrisburg-Philadelphia service is commuter rather than intercity in nature is certain to cast a shadow on the legal authority of the National Railroad Passenger Corporation (Amtrak) to operate that service.

I am convinced that, under most circumstances, the public interest would best be served by permitting Amtrak to assume the responsibility for any rail passenger service which it believes would fit in well

with its intercity system and would be profitable—as is the case here. Moreover, I believe that Amtrak's interpretation of the governing legislation should be accorded substantial weight since it is, after all, the creature of that legislation.

Even in light of these considerations, however, I am unable to conclude that the service in question is intercity in character. Despite the terminal points of the trains involved, the record is convincing that the service actually consists of two separate commuter operations, the one serving Philadelphia, and the other Harrisburg.

COMMISSIONER GRESHAM, concurring:

Because of the stature and experience of my distinguished Brother Tuggle, it is with extreme reluctance that I am compelled to enter this expression disagreeing with his dissent below. My brother indicates his conclusion that the trains here are without the statutory exclusion involved to the degree that they are operated "between" two major metropolitan areas, Philadelphia and Harrisburg, rather than "in" metropolitan and suburban areas. Much as I might like, I cannot make such a reading of the statute nor of the flexible criteria which we set forth in *Penn Central Transp. Co. Discontinuance*, 338 I.C.C. 318, at page 326 (1971). In the cited report we said that in order for a train to be within the exclusion it would "likely" include some or all of the features set forth in six criteria. Thus, these criteria are flexible or elastic, not rigid. And although we found in the cited case that the trains in question there were Boston-oriented, it is my belief that the reading of the statute shown by the dissent here, if applied in the cited case, would relegate Providence, R.I., to the position of a suburb of Boston.

Some of the trains here are oriented to Harrisburg and others to Philadelphia. And the majority of the patronage of all of the trains appear to be commuters. Thus, the conclusion in the report here that we have "back-to-back commuter operations" seems correct to me. And while the trains operate over a span of 103.2 miles, number (6) of the elastic criteria laid down in the cited case does not pose any obstacle to the conclusion drawn in view of the trappings of essentially commuter service that are shown in the eloquent analysis by the majority in the report. For the sixth criterion is:

(6) The service should not extend more than 100 miles at the most, *except in rare instances;* although service over shorter distances may not be commuter or short haul within the meaning of the exclusion. [Emphasis supplied.]

I, therefore, am in accord with the decision.

COMMISSIONER TUGGLE, whom COMMISSIONER MURPHY joins, dissenting in part:

I respectfully disagree with the conclusion of the majority that these Philadelphia-Harrisburg trains are "commuter or other short-haul service" under the statutory definition set out in section 102(5)(A) of the Rail Passenger Service Act of 1970 (Amtrak Statute). In order to fall within the commuter exclusion of the Amtrak Statute, the service under consideration must meet two basic statutory imperatives. One, even if the service may be characterized by operational features and passenger usage as being "commuter" in nature, it must be *short-haul* commuter service. Secondly, the service must be *in* "metropolitan and suburban areas." The use of the above phrase in the statute indicates that Congress desired to exclude *local* service in metropolitan and suburban areas from a *national* plan for the operation of intercity service by a quasi-governmental corporation, Amtrak.

The record before us indicates that the subject trains operate between three metropolitan areas, Philadelphia, Lancaster, and Harrisburg. Both Philadelphia, as the financial and cultural center of the State, and Harrisburg, as the State Capitol, are major metropolitan areas. In the majority report, reference is made to the fact that these trains represent "back-to-back" commuter services, with Lancaster being the focal point for operations in either direction. However, it is seen that the trains in question, trains Nos. 600, 602, 611, and 613, actually maintain schedules between Philadelphia and Harrisburg, with 11 percent of the passengers using the trains on a through basis. Thus, the "back-to-back" characterization is wholly dependent on the "primary" usage of these particular trains by commuters. As I will discuss in further detail below, I feel that the characterization stretches the statute too far, is too much of a variable to be a determinant of our jurisdiction and ignores the imperative of the statute as to the physical nature of the service—i.e., the schedule maintained—which imperative requires the service to be "short-haul." Furthermore, there is an additional imperative of the statute relating to the physical nature of the operation—"in metropolitan and suburban areas"—and I must also conclude that these particular trains are without the statutory definition to the degree that they are operated "between" two major metropolitan areas, Philadelphia and Harrisburg, rather than "in" metropolitan and suburban areas.

As to the short-haul question, the distance involved, 103.2 miles, raises substantial doubt as to whether this service can properly be characterized as being "short-haul," commuter or not. In the *Penn Central* case, at 338 I.C.C. 326, one of the features stated as being a "likely" indicator of "commuter and other short-haul service" was described as follows:

> (6) The service should not extend more than 100 miles at the most, except in rare instances; *although service over shorter distances may not be commuter or short haul within the meaning of the exclusion.* [Emphasis supplied.]

As Brother Gresham notes in his concurring expression, the use of the term "likely" connotes that these criteria generally are flexible in nature, and such an interpretation is supported by the fact that criterion (6) specifically states that service of less than 100 miles may still not be classified as being "commuter or other short-haul." Because of the qualified nature of these criteria, I would view them as being general guidelines to use in construing the statutory definition in section 102(5)(A) of the Amtrak Statute. Moreover, the "short-haul" question was not really in issue in the *Penn Central* case in that the subject trains in that proceeding only operated over a distance of 44 miles from Providence to Boston. For these reasons, I would not view the *Penn Central* case as being determinative of this vital question, and I would find these particular trains to be more in the nature of "intermediate-haul," intercity service between two major metropolitan areas.

At this point in time, the Commission has considered three cases which stand as matters of first impression in terms of the Commission's definition of its jurisdiction pursuant to the Amtrak Statute. I am of the view that there is an issue underlying all of these proceedings which points to the need of the Commission to further analyze the basis of determining its jurisdiction in this area. Thus, our determinations in these three proceedings are basic in a legal sense in that the standards which we are developing will determine the limits of our subject matter jurisdiction in this important sphere of regulation. The method of classifying certain train service as either "intercity" or "commuter and other short-haul" is of great import in that the former classification results in jurisdiction over the subject matter residing with Amtrak, or under the related procedures of the Amtrak Statute, while the latter classification results in jurisdiction resting with the Commission under the procedures of section 13a of the Interstate Commerce Act.

In the *Penn Central* report, it was noted (at page 323) that the legislative history of the Amtrak Statute shows that the fact that a train is used by commuters does not, *ipso facto*, remove it from the statute as not being intercity service. The report further stated (at page 323) that:

> The pivotal question becomes whether the train is "primarily" *used by commuters* or merely "incidentally" so used. [Emphasis supplied.]

I would question whether the Senate floor discussion cited in the report *necessarily* would lead one to draw the same inference as that made in the prior report. For instance, Senator Vance Hartke is cited as saying that the bill's provisions "would not apply to service which is primarily commuter service." (Cong. Rec. May 5, 1970, page S6652). Senator Winston Prouty also indicated that "*** an intercity train which incidentally happens to pick up commuters, nevertheless, would be part of the system." (Id. page S6666). I would see this discussion as reflecting the views of these authors of the legislation as to what constitutes intercity service, even when a particular train may have some attributes of "commuter" service. However, I would *not* construe this discussion as defining what "commuter" service *is*. Such definitions and interpretations of the statute were to be initially made by the Commission. Accordingly, the inference I would question in the prior report is whether the Amtrak legislative history stands for the proposition that "primary" *usage* of a train by commuters would result in classifying such service as "commuter or other short-haul."

Section 102(5) of the Amtrak Statute reads, in part, as follows:

> "Intercity rail passenger service" means all rail passenger service other than (A) commuter and other short-haul service in metropolitan areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations***.

As stated above, the imperative of the statute (by the reference to "commuter and *other* short-haul") is that the service must be short haul. Then, we examine the other factors of the service relating to its operational characteristics (commutation tickets, peak period operations, et cetera) and "primary" usage by commuters. So, it would appear that the statute has a certain duality of definition in that the "commuter and other short-haul" provision refers to the *physical nature of the service* (the length of operation), while the second portion of the statute refers to the *operational nature of the service*

in the language relating to the characteristics of commuter operations. So, that if there is this duality of definition in the statute, which criterion should be controlling as to the Commission's determination of jurisdiction in this area?

It is my belief that on a matter so fundamental as our jurisdiction, the Commission cannot solely rely on the operational nature of a particular service. This is because such factors represent an ever-changing fact pattern that will differ from case to case. So that, I would conclude that the proper method of analysis in these cases is seen in a method of classification which first considers the physical nature of a particular service as being the primary indicator of Commission jurisdiction and which secondly looks to operational factors. I have stated which side of the physical *vis-a-vis* operational classification I would come down on, and I would suggest that the Commission might want to address itself to this overall question. It is possible, of course, that we might have a "borderline" case where it would be a close decision as to the short- or long-haul nature of a particular service. In such an instance, we would likely place a greater emphasis on operational factors.

In conclusion, however, my remarks herein should not be taken as casting doubt on the result in the *Penn Central* case, which I voted to approve. I have merely tried to illustrate that the analysis did not go far enough because it was not necessary—the "short-haul" question was not in issue. Thus, it was proper for that report to emphasize the six criteria relating to the operational nature of a "primarily" commuter-type service.

Finally, I would agree with the majority that the substituted-bus-for-rail service operated between Lancaster and York is not "intercity passenger service" under the Amtrak Statute.

VICE CHAIRMAN HARDIN dissents.

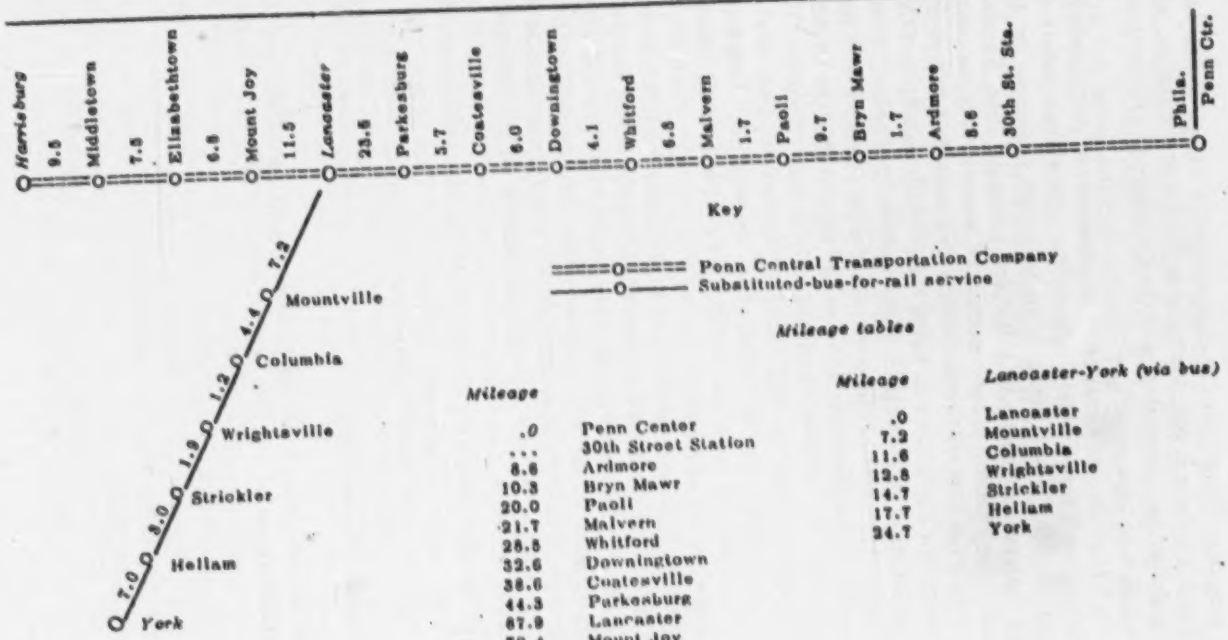
Dated at Washington, D. C., this 24th day of June 1971.
By the Commission.

ROBERT L. OSWALD.
Secretary.

(SEAL)

APPENDIX A

Straight line diagram map of Penn Central's rail route between Philadelphia and Harrisburg, its substituted-bus-for-rail service between Lancaster and York, and the respective mileage tables



Mileage tables

Mileage		
.0	Penn Center	
...	30th Street Station	
8.6	Ardmore	
10.3	Bryn Mawr	
20.0	Paoli	
21.7	Malvern	
28.5	Whitford	
32.6	Downingtown	
38.6	Coatesville	
44.3	Parkesburg	
67.9	Lancaster	
79.4	Mount Joy	
86.2	Klizabethtown	
93.7	Middletown	
103.2	Harrisburg	

Mileage	Lancaster-York (via bus)
.0	Lancaster
7.2	Mountville
11.6	Columbia
12.8	Wrightsville
14.7	Strickler
17.7	Hellam
24.7	York

APPENDIX B

Population 1970-1960

Route: Philadelphia-Harrisburg Lancaster-York	Local population		Metropolitan area	
	1970	1960	1970	1960
Pennsylvania				
Philadelphia	1,948,609	2,022,512	4,817,810	4,342,847
Overbrook	----------	----------	----------	----------
Narberth	----------	----------	----------	----------
Ardmore	----------	----------	----------	----------
Bryn Mawr	----------	----------	----------	----------
Included in Philadelphia	----------	----------	----------	----------
Rosemont	----------	----------	----------	----------
Wayne	----------	----------	----------	----------
Berwyn	----------	----------	----------	----------
Paoli	----------	----------	----------	----------
Malvern	2,583	2,265	----------	----------
Whitford	NS	NS	----------	----------
Downingtown	7,437	5,598	----------	----------
Coatesville	12,331	12,971	----------	----------
Parkesburg	2,700	2,759	----------	----------
Lancaster	57,690	61,055	319,693	278,359
Mount Joy	5,041	3,292	----------	----------
Elizabethtown	5,072	6,780	----------	----------
Middletown	9,080	11,182	----------	----------
Harrisburg	68,081	79,697	410,626	345,071
Mountville	1,454	1,411	----------	----------
Columbia	11,237	12,075	----------	----------
Wrightsville	2,668	2,345	----------	----------
Strickler	NS	NS	----------	----------
Hellam	NS	NS	----------	----------
York, Pa	50,335	54,504	329,540	238,336

NS—Not shown.
Source.—U.S. Department of Commerce/Bureau of Census.

APPENDIX C

Substituted-bus-for-rail schedules from Lancaster to York

	Bus[1] No. 0553 daily	Bus[2] No. 0557 daily	Bus[3] No. 0559 daily
	A.M.	*P.M.*	*P.M.*
Lancaster (Penn Central Station)	Lv. 10:40	3:35	5:00
Mountville	-do-	3:50	----
Columbia	-do- 11:02	3:57	5:22
Wrightsville	-do- 11:07	4:02	5:27
Strickler	-do- 11:11	4:06	5:31
Hellam	-do- 11:15	4:10	5:35
York (Penn Central Station)	Ar. 11:35	4:25	5:55

See footnotes on following page.

POOR COPY

[1]Bus No. 0553 is scheduled to make connections with train No. 25 departing Pennsylvania Station, New York, N.Y., at 7:35 a.m., departing North Philadelphia at 9:06 a.m., departing Paoli at 9:40 a.m., and arriving at Lancaster at 10:25 a.m.

[2]Bus No. 0557 is scheduled to make connections with train No. 211 departing Pennsylvania Station, New York City, at 11:45 a.m., arriving 30th Street Station, Philadelphia at 1:30 p.m., and train No. 33 departing 30th Street Station, Philadelphia at 2:05 p.m., departing Paoli at 2:33 p.m., and arriving at Lancaster at 3:14 p.m. Effective May 1, 1971, train No. 33 has been discontinued, and train No. 633, departing Penn Center (Suburban Station) at 2:05 p.m. and arriving Lancaster at 3:14 p.m., has been instituted.

[3]Bus No. 0559 is scheduled to make connections with train No. 49 departing Pennsylvania Station, New York City at 4:55 p.m., departing North Philadelphia Station at 6:21 p.m., departing Paoli at 6:53 p.m., and arriving at Lancaster at 7:40 p.m. Also, Bus No. 0559 is scheduled to make connections with train No. 613 departing Penn Center (Suburban Station) at 6:20 p.m., and arriving Lancaster at 7:32 p.m.

Substituted-bus-for-rail schedules from York to Lancaster

		Bus[1] No. 0552 daily	Bus[2] No. 0558 daily	Bus[3] No. 0560 daily	Bus[4] No. 0572 daily except Saturday
		A.M.			*P.M.*
York (Penn Central Station)	Lv.	7:22	1:45	5:25	9:10
Hellam	-do-	7:37	2:00	5:40	9:25
Strickler	-do-	7:41	2:04	5:44	9:29
Wrightsville	-do-	7:45	2:08	5:48	9:33
Columbia	-do-	7:50	2:13	5:53	9:38
Mountville	-----	-----	2:20	-----	-----
Lancaster (Penn Central Station)	Ar.	8:17	2:40	6:20	10:05

[1]Bus No. 0552 is scheduled to make connections at Lancaster with train No. 604 departing Harrisburg at 8 a.m., and departing Lancaster at 8:33 a.m., which in turn makes a connection with a train to New York City—train No. 206.

[2]Bus No. 0558 is scheduled to make connections at Lancaster with train No. 54 departing Chicago at 10:30 p.m., departing Pittsburgh at 8:50 a.m., departing Harrisburg at 2:16 p.m., and departing Lancaster at 3:05 p.m., and arriving in New York City at 6:15 p.m. Effective May 1, 1971, train No. 54 has been discontinued; and train No. 618, departing Harrisburg at 3 p.m. and departing Lancaster at 3:33 p.m., has been instituted.

[3]Bus No. 0560 is scheduled to make connections at Lancaster with train No. 16 departing Pittsburgh at 12:35 p.m., departing Harrisburg at 5:55 p.m., and departing Lancaster at 6:38 p.m., arriving in New York City at 9:25 p.m.

[4]Bus No. 0572 is scheduled to make connections at Lancaster with train No. 24 departing Pittsburgh at 4 p.m., departing Harrisburg at 9:45 p.m., and departing Lancaster at 10:17 p.m., which train, in turn, makes a connection with a train to New York City—train No. 176. Effective May 1, 1971, train No. 24 has been discontinued.

APPENDIX D

The involved train schedules from Philadelphia to Harrisburg[1]

	Train No. 601 except Saturday, Sunday, and holidays	Train No. 603 except Sunday and holidays	Train No. 605 except Saturday, Sunday, and holidays	Train No. 607 daily	Train No. 609 except Saturday, Sunday, and holidays	Train No. 611 except Saturday, Sunday, and holidays	Train No. 617 Saturday, Sunday, and holidays only	Train No. 613 except Saturday, Sunday, and holidays	Train No. 615 except Saturday
	a.m.	a.m.	a.m.	p.m.	p.m.	p.m.	p.m.	p.m.	p.m.
Philadelphia:									
Penn Center----------Lv-----	5:45	8:00	10:25	12:42	3:25	5:27	5:54	6:20	9:50
30th Street Station----------do-----	5:48	8:03	10:28	12:45	3:28	5:30	5:57	6:23	9:53
Ardmore----------do-----	6:00	8:13	10:38	-----	---------	-------	--------	--------	----------
Bryn Mawr----------do-----	6:03	------	--------	-----	---------	-------	--------	--------	----------
Paoli----------do-----	6:21	8:27	10:51	1:07	3:50	[c]5:54	6:20	6:45	10:15
Malvern----------do-----	--------	------	---------	-----	[d]3:53	6:01	--------	6:47	10:17
Whitford----------do-----	--------	------	---------	-----	3:59	6:08	[a]6:28	6:54	10:24
Downingtown----------do-----	6:34	8:38	11:03	1:20	4:04	6:13	6:32	6:59	10:29
Coatesville----------do-----	6:40	8:45	11:09	1:26	4:10	6:19	6:38	7:05	10:35
Parkesburg----------do-----	--------	------	---------	-----	---------	-------	--------	7:10	----------
Lancaster----------do-----	7:07	9:11	11:35	1:52	4:37	6:45	7:05	7:32	11:01
Mount Joy----------do-----	7:19	------	---------	-----	---------	-------	--------	--------	----------
Elizabethtown----------do-----	7:26	9:27	---------	-----	4:53	7:02	7:21	7:48	11:17
Middletown----------do-----	7:33	------	---------	-----	---------	-------	--------	--------	----------
Harrisburg----------Ar-----	7:45	9:45	12:07p.m.	2:25	5:10	7:19	7:38	8:05	11:34

[c]Stops only to receive passengers.

[d]Stops only to discharge passengers.

[a]Stops only on Saturday.

[1]The Saturday schedules consist of trains Nos. 603, 607, and 617; and the Sunday and holiday schedules consist of trains Nos. 607, 617, and 615. The holiday schedules are followed when a holiday (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day) falls within the 5-day period, Monday through Friday.

APPENDIX D--Continued

The involved train schedules from Harrisburg to Philadelphia[1]

	Train No. 600 except Saturday, Sunday, and holidays	Train No. 602 except Sunday, and holidays	Train No. 604 daily	Train No. 606 except Saturday, Sunday, and holidays	Train No. 608 except Sunday, and holidays	Train No. 610 except Saturday	Train No. 612 except Saturday, Sunday, and holidays	Train No. 614 daily
	a.m.	a.m.	a.m.	a.m.	p.m.	p.m.	p.m.	p.m.
Harrisburg----------Lv----------	5:41	6:50	8:00	10:05	12:35	4:25	5:25	7:55
Middletown----------do----------	--------	--------	--------	--------	--------	--------	5:40	----------
Elizabethtown----------do----------	5:58	--------	8:16	--------	--------	4:41	5:47	----------
Mount Joy----------do----------	--------	--------	--------	--------	--------	--------	5:54	----------
Lancaster----------do----------	6:15	7:22	8:33	10:37	1:07	4:58	6:07	8:27
Parkesburg----------do----------	--------	7:43	--------	--------	--------	--------	------	----------
Coatesville----------do----------	6:41	7:49	8:59	11:03	1:33	5:24	6:32	8:53
Downingtown----------do----------	6:48	7:55	9:05	11:09	1:39	5:30	6:38	8:59
Whitford----------do----------	6:53	8:00	9:10	--------	--------	--------	-------	----------
Malvern----------do----------	7:00	8:06	[f]9:16	--------	--------	--------	-------	----------
Paoli----------do----------	[d]7:04	[d]8:09	9:19	11:22	1:51	5:42	6:50	9:11
Bryn Mawr----------do----------	--------	--------	-------	--------	--------	--------	-------	----------
Ardmore----------do----------	--------	--------	-------	--------	--------	5:55	7:03	----------
Philadelphia:								
30th Street (Penn Central Station--Ar-	7:29	8:34	9:44	11:50	2:18	6:06	7:14	9:34
Penn Center----------do-	7:33	8:38	9:48	11:54	2:22	6:10	7:18	9:38

[d]Stops only to discharge passengers.

[f]Stops only on signal or notice to agent or conductor to receive or discharge passengers.

[1]The Saturday schedules consist of trains Nos. 602, 604, 608, and 614; and the Sunday and holiday schedules consist of trains Nos. 604, 610, and 614. The holiday schedules are followed when a holiday (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day) falls within the 5-day period, Monday through Friday.

APPENDIX E

Connecting service on the 600- and 200-series trains between New York City and Harrisburg

Train No.	Arrive Philadelphia 30th Street Station	Connecting train No.	Leave Philadelphia 30th Street Station
Eastbound service prior to May 1, 1971			
600	7:29 a.m.	202	8:00 a.m.
602	8:34 a.m.	204	9:00 a.m.
604	9:44 a.m.	206	10:15 a.m.
604	9:44 a.m.	126	10:58 a.m.
606	11:50 a.m.	172	12:14 p.m.
608	2:15 p.m.	218	3:00 p.m.
610	6:06 p.m.	152	6:19 p.m.
614	9:34 p.m.	158	9:42 p.m.
Eastbound service effective May 1, 1971			
600	7:29 a.m.	202	8:00 a.m.
602	8:34 a.m.	204	9:00 a.m.
604	9:44 a.m.	206	10:15 a.m.
606	11:50 a.m.	172	12:14 p.m.
608	2:15 p.m.	218	3:00 p.m.
618*	4:41 p.m.	132	5:13 p.m.
610	6:06 p.m.	152	6:19 p.m.
614	9:45 p.m.	538	9:35 p.m.
Westbound service prior to May 1, 1971			
177X	5:09 a.m.	601	5:48 a.m.
207	10:15 a.m.	605	10:28 a.m.
137	12:21 p.m.	607	12:45 p.m.
211¢	1:30 p.m.	33	2:05 p.m.
171	2:22 p.m.	609	3:28 p.m.
173	4:39 p.m.	611	5:30 p.m.
219	5:46 p.m.	617	5:57 p.m.
215	6:05 p.m.	613	6:23 p.m.
155	9:06 p.m.	615	9:53 p.m.
Westbound service effective May 1, 1971			
207	10:15 a.m.	605	10:28 p.m.
137	12:21 p.m.	607	12:45 p.m.
211¢	1:30 p.m.	633	2:08 p.m.
171	2:22 p.m.	609	3:28 p.m.
173	4:34 p.m.	611	5:30 p.m.
219	5:46 p.m.	617	5:57 p.m.
215	6:05 p.m.	613	6:28 p.m.
155	9:06 p.m.	615	9:53 p.m.

X—Connection discontinued.
*—New connecting trains added.
¢—Train No. 33 discontinued and train No. 633 added.

APPENDIX F

The following is the fare table in effect prior to May 1, 1971, between Philadelphia and the specified communities served by the 600-series trains

Between Philadelphia and	One-way coach	Bargain one-way coach[1]	Calendar month individual	10-trip 2-month bearer
Paoli	$1.15	$0.85	$39.00	$11.00
Malvern	1.30	1.00	43.00	12.00
Whitford	1.60	1.20	48.00	14.50
Downingtown	1.60	1.20	48.00	14.50
Coatesville	1.80	1.40	51.00	16.50
Parkesburg	2.00	1.60	54.00	18.00
Lancaster	4.25	3.00	73.00	31.00
Mount Joy	4.75	4.00	80.00	35.00
Elizabethtown	5.00	4.25	87.00	37.50
Middletown	5.50	4.50	91.00	41.00
Harrisburg	6.00	4.50	98.00	45.00

[1]The bargain ticket is good into Philadelphia on all trains arriving Penn Central Station—30th Street—AFTER 9:30 a.m. *** BUT NOT GOOD on trains arriving BETWEEN 2:00 a.m. and 9:30 a.m. From Philadelphia, the bargain ticket is good on all trains EXCEPT those scheduled to leave Penn Central Station—30th Street—BETWEEN 2:00 a.m. and 9:30 a.m. (for tickets Paoli and east) or BETWEEN 4:30 p.m. and 6:00 p.m. (for tickets to all stations).

APPENDIX G

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 16-21, 1970, and the number remaining on board at each station.

Station	Average weekday			Average weekday		
	On	Off	On board	On	Off	On board
Train No. 600 (weekdays only)						
Harrisburg	23	-----	23	-----	-----	-----
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	15	0	38	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	35	7	66	-----	-----	-----
Parkesburg	-----	-----	-----	-----	-----	-----
Coatesville	42	3	105	-----	-----	-----
Downingtown	48	6	147	-----	-----	-----
Whitford	50	0	197	-----	-----	-----
Malvern	38	1	234	-----	-----	-----
Paoli	67	11	290	-----	-----	-----
Ardmore	-----	-----	-----	-----	-----	-----
30th Street Station	0	101	189	-----	-----	-----
Suburban Station	-----	159	-----	-----	-----	-----
Train No. 602 (weekdays and Saturday)						
Harrisburg	25	-----	25	10	-----	10
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	-----	-----	-----	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	45	7	63	21	1	30
Parkesburg	2	0	65	-----	-----	-----
Coatesville	35	1	99	6	0	36
Downingtown	50	0	149	6	0	42
Whitford	44	0	193	1	0	43
Malvern	46	2	237	-----	-----	-----
Paoli	-----	10	227	18	5	[illegible]
Ardmore	-----	-----	-----	-----	-----	-----
30th Street Station	4	57	174	0	30	21
Suburban Station	-----	174	-----	-----	21	-----
Train No. 604 (weekdays, Saturday, and Sunday)						
Harrisburg	24	-----	24	24	-----	24
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	2	1	25	3	1	26
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	25	5	45	28	4	48
Parkesburg	-----	-----	-----	-----	-----	-----
Coatesville	22	3	65	14	0	62
Downingtown	11	1	75	3	0	65
Whitford	1	0	76	-----	-----	-----
Malvern	2	0	78	-----	-----	-----
Paoli	42	5	115	24	4	85
Ardmore	-----	-----	-----	-----	-----	-----
30th Street Station	4	39	80	2	36	51
Suburban Station	-----	80	-----	-----	51	-----

See footnote at end of table.

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 15-21, 1970, and the number remaining on board at each station.—Continued

Station	Average weekday			Average weekend		
	On	Off	On board	On	Off	On board
Train No. 606 (weekdays)						
Harrisburg	17	-----	17	-----	-----	-----
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	-----	-----	-----	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	14	4	27	-----	-----	-----
Parkesburg	-----	-----	-----	-----	-----	-----
Coatesville	9	1	35	-----	-----	-----
Downingtown	3	0	38	-----	-----	-----
Whitford	-----	-----	-----	-----	-----	-----
Malvern	-----	-----	-----	-----	-----	-----
Paoli	8	3	43	-----	-----	-----
Ardmore	-----	-----	-----	-----	-----	-----
30th Street Station	0	20	23	-----	-----	-----
Suburban Station	-----	23	-----	-----	-----	-----
Train No. 608 (weekdays and Saturday)						
Harrisburg	42	-----	42	27	-----	27
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	-----	-----	-----	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	20	10	52	28	4	51
Parkesburg	-----	-----	-----	-----	-----	-----
Coatesville	10	2	60	8	2	57
Downington	5	0	65	7	1	63
Whitford	-----	-----	-----	-----	-----	-----
Malvern	-----	-----	-----	-----	-----	-----
Paoli	10	10	65	9	5	67
Ardmore	-----	-----	-----	-----	-----	-----
30th Street Station	0	34	31	0	25	42
Suburban Station	-----	31	-----	-----	42	-----
Train No. 610 (weekdays and Sunday)						
Harrisburg	65	-----	65	25	-----	25
Middletown	-----	-----	-----	-----	-----	-----
Elizabethtown	6	5	66	7	0	32
Mount Joy	-----	-----	-----	-----	-----	-----
Lancaster	29	20	75	31	2	60
Parkesburg	-----	-----	-----	-----	-----	-----
Coatesville	9	3	81	6	3	63
Downingtown	20	4	97	7	0	70
Whitford	-----	-----	-----	-----	-----	-----
Malvern	-----	-----	-----	-----	-----	-----
Paoli	17	12	102	0	1	69
Ardmore	8	14	96	8	1	74
30th Street Station	0	55	41	0	54	20
Suburban Station	-----	41	-----	-----	20	-----

See footnote at end of table

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 15-21, 1970, and the number remaining on board at each station.—Continued

Station	Average weekday			Average weekend		
	On	Off	On board	On	Off	On board
Train No. 612 (weekdays)						
Harrisburg	54	-----	54	----	----	-----
Middletown	3	11	46	----	----	-----
Elizabethtown	0	8	38	----	----	-----
Mount Joy	0	2	36	----	----	-----
Lancaster	4	17	23	----	----	-----
Parkesburg	-----	-----	-----	----	----	-----
Coatesville	4	1	26	----	----	-----
Downingtown	0	1	25	----	----	-----
Whitford	-----	-----	-----	----	----	-----
Malvern	-----	-----	-----	----	----	-----
Paoli	3	6	22	----	----	-----
Ardmore	2	4	20	----	----	-----
30th Street Station	0	11	9	----	----	-----
Suburban Street	-----	9	-----	----	----	-----
Train No. 614 (weekdays, Saturday, and Sunday)						
Harrisburg	16	-----	16	50	----	50
Middletown	-----	-----	-----	----	----	-----
Elizabethtown	-----	-----	-----	----	----	-----
Mount Joy	-----	-----	-----	----	----	-----
Lancaster	10	2	24	25	11	64
Parkesburg	-----	-----	-----	----	----	-----
Coatesville	2	0	26	8	3	69
Downingtown	0	0	26	5	0	74
Whitford	-----	-----	-----	----	----	-----
Malvern	-----	-----	-----	----	----	-----
Paoli	6	3	29	14	8	80
Ardmore	-----	-----	-----	----	----	-----
30th Street Station	0	19	10	0	58	22
Suburban Station	-----	10	-----	----	22	-----
Train No. 601 (weekdays only)						
Suburban Station	17	-----	17	----	----	-----
30th Street Station	28	1	44	----	----	-----
52nd Street Station	3	0	47	----	----	-----
Overbrook	8	0	55	----	----	-----
Narberth	0	2	53	----	----	-----
Ardmore	7	2	58	----	----	-----
Bryn Mawr	1	1	58	----	----	-----
Rosemont	1	1	58	----	----	-----
Wayne	0	4	54	----	----	-----
Berwyn	0	0	54	----	----	-----
Paoli	7	22	39	----	----	-----
Malvern	-----	-----	-----	----	----	-----
Whitford	-----	-----	-----	----	----	-----
Downingtown	4	16	27	----	----	-----
Coatesville	1	2	26	----	----	-----
Parkesburg	-----	-----	-----	----	----	-----
Lancaster	35	5	59	----	----	-----
Mount Joy	3	0	62	----	----	-----
Elizabethtown	16	4	74	----	----	-----
Middletown	13	3	84	----	----	-----
Harrisburg	-----	84	-----	----	----	-----

See footnote at end of table.

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 15-21, 1970, and the number remaining on board at each station.—Continued

Station	Average weekday			Average weekend		
	On	Off	On board	On	Off	On board
Train No. 603 (weekdays and Saturday)						
Suburban Station	42	-----	42	33	-----	33
30th Street Station	44	6	80	33	4	62
Ardmore	15	13	52	2	4	60
Paoli	11	27	66	11	10	61
Malvern	----	-----	-----	-----	-----	-----
Whitford	----	-----	-----	-----	-----	-----
Downingtown	2	4	64	0	7	54
Coatesville	1	4	61	5	5	56
Parkesburg	----	-----	-----	-----	-----	-----
Lancaster	10	9	62	12	2	66
Mount Joy	----	-----	-----	-----	-----	-----
Elizabethtown	0	2	60	0	0	66
Middletown	----	-----	-----	-----	-----	-----
Harrisburg	----	60	-----	-----	66	-----
Train No. 605 (weekdays)						
Suburban Station	27	-----	27	-----	-----	-----
30th Street Station	18	4	41	-----	-----	-----
Ardmore	2	4	39	-----	-----	-----
Paoli	4	9	34	-----	-----	-----
Malvern	----	-----	-----	-----	-----	-----
Whitford	----	-----	-----	-----	-----	-----
Downingtown	1	3	32	-----	-----	-----
Coatesville	5	5	27	-----	-----	-----
Parkesburg	----	-----	-----	-----	-----	-----
Lancaster	2	8	21	-----	-----	-----
Mount Joy	----	-----	-----	-----	-----	-----
Elizabethtown	----	-----	-----	-----	-----	-----
Middletown	----	-----	-----	-----	-----	-----
Harrisburg	----	21	-----	-----	-----	-----
Train No. 607 (weekdays, Saturday, and Sunday)						
Suburban Station	36	-----	36	39	-----	39
30th Street Station	23	0	59	44	3	80
Ardmore	----	-----	-----	-----	-----	-----
Paoli	2	15	46	5	21	64
Malvern	----	-----	-----	-----	-----	-----
Whitford	----	-----	-----	-----	-----	-----
Downingtown	0	5	41	1	13	52
Coatesville	0	10	31	0	21	31
Parkesburg	----	-----	-----	-----	-----	-----
Lancaster	5	15	21	15	15	31
Mount Joy	----	-----	-----	-----	-----	-----
Elizabethtown	----	-----	-----	-----	-----	-----
Middletown	----	-----	-----	-----	-----	-----
Harrisburg	----	21	-----	-----	31	-----
Train No. 609 (weekdays)						
Suburban Station	105	-----	105	-----	-----	-----
30th Street Station	33	0	138	-----	-----	-----
Ardmore	----	-----	-----	-----	-----	-----
Paoli	7	43	102	-----	-----	-----

See footnote at end of table.

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 15-21, 1970, and the number remaining on board at each station.—Continued

Station	Average weekday			Average weekend		
	On	Off	On board	On	Off	On board
Train No. 609 (weekdays)—Continued						
Malvern	0	2	100	-----	-----	-----
Whitford	0	5	95	-----	-----	-----
Downingtown	5	19	81	-----	-----	-----
Coatesville	0	23	58	-----	-----	-----
Parkesburg	-----	-----	-----	-----	-----	-----
Lancaster	1	26	33	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Elizabethtown	0	3	30	-----	-----	-----
Middletown	-----	-----	-----	-----	-----	-----
Harrisburg	-----	30	-----	-----	-----	-----
Train No. 611 (weekdays)						
Suburban Station	344	-----	344	-----	-----	-----
30th Street Station	76	0	420	-----	-----	-----
Ardmore	-----	-----	-----	-----	-----	-----
Paoli	25	169	276	-----	-----	-----
Malvern	0	45	231	-----	-----	-----
Whitford	0	59	172	-----	-----	-----
Downingtown	0	54	118	-----	-----	-----
Coatesville	0	51	67	-----	-----	-----
Parkesburg	-----	-----	-----	-----	-----	-----
Lancaster	6	38	35	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Elizabethtown	0	16	19	-----	-----	-----
Harrisburg	-----	19	-----	-----	-----	-----
Train No. 613 (weekdays)						
Suburban Station	73	-----	73	-----	-----	-----
30th Street Station	70	0	143	-----	-----	-----
Ardmore	-----	-----	-----	-----	-----	-----
Paoli	6	52	97	-----	-----	-----
Malvern	0	12	85	-----	-----	-----
Whitford	0	13	72	-----	-----	-----
Downingtown	0	13	59	-----	-----	-----
Coatesville	0	17	42	-----	-----	-----
Parkesburg	0	4	38	-----	-----	-----
Lancaster	0	21	17	-----	-----	-----
Mount Joy	-----	-----	-----	-----	-----	-----
Elizabethtown	0	4	13	-----	-----	-----
Middletown	-----	-----	-----	-----	-----	-----
Harrisburg	-----	13	-----	-----	-----	-----
Train No. 615 (weekdays and Sunday)						
Suburban Station	37	-----	37	12	-----	12
30th Street Station	48	0	85	52	0	64
Ardmore	-----	-----	-----	-----	-----	-----
Paoli	6	28	63	14	2	76
Malvern	0	2	61	-----	-----	-----
Whitford	0	4	57	0	0	76
Downingtown	0	10	47	0	2	74
Coatesville	0	9	38	0	6	68
Parkesburg	-----	-----	-----	-----	-----	-----

See footnote at end of table.

Average number of passengers per trip (weekday and weekend)[1] boarding and leaving subject trains during the week of November 15-21, 1970, and the number remaining on board at each station.—Continued

Station	Average weekday			Average weekend		
	On	Off	On board	On	Off	On board
Train No. 615 (weekdays and Sunday)—Continued						
Lancaster	2	20	20	3	25	46
Mount Joy	-----	-----	-----	-----	-----	----
Elizabethtown	0	1	19	0	13	33
Middletown	-----	-----	-----	-----	-----	----
Harrisburg	-----	19	-----	-----	33	----

Station	Sunday, Nov. 15, 1970			Saturday, Nov. 21, 1970		
	On	Off	On board	On	Off	On board
Train No. 617 (Saturdays, Sunday, and holidays)						
Suburban Station	70	-----	70	34	-----	34
30th Street Station	66	0	136	32	0	66
Ardmore	----	-----	-----	-----	-----	-----
Paoli	20	10	146	18	6	78
Malvern	----	-----	-----	0	0	78
Whitford	----	-----	-----	-----	-----	-----
Downingtown	2	1	147	1	0	79
Coatesville	4	39	112	2	16	65
Parkesburg	----	-----	-----	-----	-----	-----
Lancaster	3	59	56	5	23	42
Mount Joy	----	-----	-----	-----	-----	-----
Elizabethtown	0	26	30	0	12	30
Middletown	----	-----	-----	-----	-----	-----
Harrisburg	----	30	-----	-----	30	-----

[1]Monday through Friday, November 16-20, 1970, comprise the 5-day period from which the average weekday on-off count is computed. Where a specified train operated on both Saturday, November 21, and Sunday, November 15, 1970, both day's figures have been utilized to compute the average weekend on-off count.

APPENDIX F

FINANCE DOCKET NO. 26634

PENN CENTRAL TRANSPORTATION COMPANY (DEBTOR)— STATUS OF CERTAIN PASSENGER SERVICE

Decided July 26, 1971

Upon investigation: (1) found that trains Nos. 200 through 298 between Philadelphia, Pa., and New York, N.Y., do not constitute "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970; and (2) found that trains Nos. 22, 23, 176, and 177 within the State of New Jersey constitute "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970.

Donald A. Brinkworth for the trustees of Penn Central Transportation Company (debtor).

Peter B. Work for the National Railroad Passenger Corporation.

Gordon P. MacDougall for the Commonwealth of Pennsylvania and the Pennsylvania Public Service Commission.

Herbert Smolen for the city of Philadelphia.

Robert J. Bossolt for tne New Jersey Department of Transportation, State of New Jersey.

REPORT OF THE COMMISSION

BUSH, *Commissioner:*

This proceeding is before us for determination of the single issue of whether subject trains Nos. 200 to 298 between Philadelphia, Pa., and New York, N.Y., and trains Nos. 22, 23, 176, and 177 within the State of New Jersey constitute "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970, P. L. 91-518, more commonly referred to as Amtrak.[1] The aforesaid trains were operated prior to May 1, 1971, by George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and W. Willard Wirtz, trustees

[1]Sec. 102(5) reads in full:

Intercity rail passenger service means all rail passenger service other than (A) commuter and other short-haul service in metropolitan and suburban areas, usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations, and (B) auto-ferry service characterized by transportation of automobiles and their occupants where contracts for such service have been consummated prior to enactment of this Act.

of the property of Penn Central Transportation Company (debtor), hereinafter called trustees or Penn Central. Effective May 1, 1971, the trains were designated by the National Passenger Corporation (Amtrak) as "Amtrak trains"; however they are operated by Penn Central pursuant to a contract with Amtrak.

On March 31, 1971, the trustees filed and posted notice of their intention to discontinue all of their intercity passenger trains in accordance with the provisions of section 401(a)(1) of the Amtrak Statute and the Commission's regulations issued thereunder. 49 CFR § 1122.9.[2] Included in Penn Central's notice of discontinuance were the 200-series[3] trains operating between New York, N.Y., and Philadelphia, Pa., and the four trains 22, 23, 176, and 177 operating within the State of New Jersey. On April 28, 1971, the Commonwealth of Pennsylvania (Commonwealth), Pennsylvania Public Utilities Commission (PUC), city of Philadelphia (city), and United Transportation Union filed a complaint in United States District Court for the Eastern District of Pennsylvania, civil action 71-1002, City of Philadelphia, et al., *v.* Baker, et al., alleging that the aforementioned trains were commuter or short-haul passenger trains and that they were incorrectly included in the discontinuance notices. The State of New Jersey additionally questioned whether trains Nos. 22, 23, 176, and 177 within the State of New Jersey constituted intercity rail passenger service. This matter was referred to District Court Judge John P. Fullam, who by order No. 244, dated April 30, 1971, in the matter of *Penn Central Transportation Company, (Debtor)*, Bankruptcy No. 70-347, required Penn Central to continue operation of the trains in the event they were discontinued by Amtrak, pending his subsequent decision.

By order No. 245, dated April 30, 1971, the court referred the aforesaid issues to the Commission for initial determination and report to this court. Pursuant to this order, the Commonwealth and the trustees filed a petition and application respectively seeking a determination of the aforementioned issues. The Commission by its order May 6, 1971, set these matters for hearing on an expedited schedule for the limited purpose of receiving evidence concerning the operation and service of the involved trains.

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[2] Ex Parte No. 217, 36 F.R. 52 19-20, March 18, 1971.

[3] The 27 trains involved in the 200 series, 200 through 298 are as follows: 200, 201, 202, 204, 206, 207, 211, 212, 213, 215, 218, 219, 220, 221, 223, 225, 227, 231, 234, 235, 254, 256, 263, 272, 280, 282, and 298; and hereinafter they will be referred to collectively as the 200-series trains operating between Philadelphia, Pa., and New York, N.Y. Trains Nos. 22 and 23 operate between New York, N.Y., and Chicago, Ill., and trains Nos. 176 and 177 operate between Boston, Mass., and Washington, D.C. None of the above trains were designated as part of the Amtrak basic system.

Our order provided *inter alia*, that the Penn Central shall prior to a specified time "***post in a conspicuous place in each station, depot and car affected by the proposed change in service, a notice setting forth the places, dates and times of the hearings herein prescribed, and a clear and concise statement of the issue involved; and shall certify to the hearing examiner at the hearing that said posting has been made." Public hearings were held on May 24, 25, and 26, 1971, at Philadelphia, Pa., Trenton, N.J., and New York, N.Y., respectively. Appearances were entered on behalf of the trustees, Amtrak, Commonwealth of Pennsylvania, city of Philadelphia, and the State of New Jersey. Briefs were filed and have been duly considered.

At the hearing, testimony in support of a finding that the involved service is not "intercity passenger service" within the meaning of section 102(5) of the Amtrak Statute was given by the Governor of Pennsylvania, the Deputy Commissioner of the Department of Public Property in Charge of Transit Engineering of the City of Philadelphia, the Director of the Division of Transportation for the State of New Jersey, and one public witness. Six witnesses on behalf of Penn Central testified in support of a finding that the involved transportation constitutes "intercity rail passenger service" within the meaning of the Amtrak Statute.

Attached herto as appendix A is a straight-line diagram map reflecting Penn Central's rail route between New York and Philadelphia showing the mileage in total to be 90.5 miles and also showing the mileage between all stations served by the trains involved herein. However, none of these trains stop at all of these stations. The 200-series trains operate a distance of 90.5 miles within three overlapping contiguous metropolitan areas as defined in the Bureau of Census Standard Metropolitan Statistical Area: Philadelphia Standard Metropolitan Statistical Area (SMSA), Trenton SMSA, and New York SMSA which includes Newark. In addition to the 2 termini (New York and Philadelphia) 10 intermediate stations are served daily including Saturday and Sunday. The minimum distance between stations served on the line is 3.3 miles between Levittown, Pa., and Bristol, Pa. The maximum distance is 18.1 miles between Bristol, Pa., and Philadelphia, Pa. The average distance is 7.5 miles. The 1970 population of the three metropolitan areas to which these trains operate is as follows: New York 11,528,659 (Newark overlaps with New York, 1,856,556), Trenton 303,968, and Philadelphia 4,817,810.[4] The 1960 and 1970 population figures for all of the intermediate stops between Philadelphia and New York are set forth in appendix B

[4]Census Bureau report of 1970 census.

hereto. A map outlining the three major Standard Metropolitan Statistical Areas (SMSA) and the counties comprising them is attached as appendix C.

The 200-series trains are merely a part of Penn Central's passenger train service between Philadelphia and New York. Although 27 trains are in the 200 series, 23 of these operate weekdays, Mondays through Fridays, 14 of the trains operate from New York to Philadelphia, and 9 operate in the reverse direction from Philadelphia to New York. Saturday service consists of nine trains from New York to Philadelphia and seven in the reverse direction. For the 200 series, nine trains from New York to Philadelphia and five trains from Philadelphia to New York are operated on Sunday.

According to the latest figures supplied by the railroad, the 9 eastbound and 14 westbound trains carry in an average weekday almost 10,000 passengers in the New Jersey suburban service, between points in New Jersey and New York City. Of these passengers, over 7,100 are on trains arriving in New York between 8:30 a.m. and 9:55 a.m., and leaving between 4 p.m. and 6 p.m. The high concentration of passengers in the commuting period and the regularity with which this weekday volume occurs shows that the major service rendered by the 200-series trains if for the benefit of regular commuters. The stops made at local intermediate stations in Pennsylvania and New Jersey by these trains are listed in the schedules of both Penn Central and Amtrak.[3] The pattern of local suburban service furnished by these trains is demonstrated by these schedules. On a weekday 80 stops are made by 23 trains at stations other than the terminal pair of cities, while on Saturday there are 59 such stops by 16 trains and on Sunday 58 stops by 14 trains.

The equipment on the 200 series varies. These trains generally carry stainless steel lightweight coaches of varying capacities. They run between 52 and 60 feet. They have reclining seats and have full baggage racks and washrooms. In addition to the coaches on the trains, 14 of them carry parlor club cars serving full course meals. Also available for coach passengers on 13 of these trains is food and beverage which is served in some instances from snackbar cars and in other instances where a so-called bar cart is rolled onto the train. All of these trains are powered by what is called GG-1 electric locomotive. Also as the Metroliners are added on the New York-Washington run the old Congressional train equipment is used on the 200-series trains. A number of the cars on these trains are former sleeper cars which have been converted and some of the equipment is quite old.

[3] See exhibit 2, et cetera.

The following types of tickets are offered: regular, one-way coach as well as first class and round trip; weekend tickets which are good on Saturdays and Sundays and are sold at a reduction of 40 percent; ladies day tickets which are good for use on Wednesdays and Thursdays between Philadelphia and New York (these tickets are not good before 9 a.m. on Wednesday and Thurday); clergy tickets which are roughly 25-percent reduction; furlough tickets which are also sold at a 25-percent reduction; school commutation tickets which are 1/6 reduction over the regular tickets (used only intrastate); suburban area bargain and thrift tickets; in the Philadelphia-Levittown area only, there are the bargain one-way tickets which are generally reduced 25 percent;* north of Trenton there are thrift tickets which are round trip tickets; coach party tickets which are used for parties of 15 or more traveling together at 25 percent off, 40 or more at 40 percent off or 100 or more at 52 percent off, and 300 or more which is the one-way fare for the round trip; then there are the commutation tickets: (1) Philadelphia to New York restricted monthly ticket at $85; (2) Philadelphia to Newark unrestricted monthly tickets costing $79; (3) Philadelphia to Trenton, unrestricted monthly, and also a 10-trip, 2-month ticket; (4) from points in New Jersey to New York unrestricted monthly tickets; and (5) 12-trip weekly tickets from New Jersey points to New York and Newark.

The 200-series trains operate between New York, N.Y., and the 30th Street Station in Philadelphia over a 90.5-mile route serving 10 intermediate stations. Not all of the trains stop at all of the stations. For example, train No. 202 stops only at North Philadelphia and Newark whereas train No. 280 stops at North Philadelphia, Levittown, Trenton, Princeton Junction, New Brunswick, Metuchen, Rahway, Elizabeth, and Newark. The entire area between Philadelphia and New York is laced with various rail commuter service. In addition to the 23 weekday 200-series trains there are 169 other commuter trains on the line operated by Penn Central. These are:

Philadelphia-Trenton	42
Trenton-New York	25
New Brunswick-New York	49
Rahway-New York	15
Bay Head-New York	20
South Amboy-New York	18
Total	169

*Tickets have a restriction that they are not good arriving in Philadelphia before 9:30 a.m. and they must be used on the return trip before the commuter runs.

A number of the Philadelphia to Trenton trains operate in conjunction with the Trenton-New York trains providing through service between Philadelphia and New York without a change of seat. The trains are given separate numbers because the Philadelphia-Trenton service is under contract with the Southeastern Pennsylvania Transportation Authority (SEPTA), and the Trenton-New York service is under contract for the State of New Jersey.

The Philadelphia-New York service is performed by Penn Central under contract with SEPTA which has certain funds made available to it from the city, the Commonwealth, and certain counties for contribution toward commuter and suburban rail passenger service within and around the Philadelphia Metropolitan area. The State of New Jersey has a program for assisting railroads to provide essential passenger service and is administered by the State Highway Department and its successor, the Department of Transportation. This program has resulted in the expenditure of $88 million for operating subsidies and a program of capital improvement estimated to cost over $300 million in public funds when completed.

Operating subsidies have been paid and capital improvements arranged through contracts under which railroads have agreed to operate certain trains on specified schedules with designated numbers of cars. The fares charged people riding in these trains are also set as a part of this contractual arrangement. The service to be provided under contract is defined by law (R.S. 27:1A-15(c)) as "***the operation of railroad trains to carry commuter and other passengers in this State or between points in this State and points in other States." The 200-series of trains as well as trains Nos. 22, 23, 176, and 177 are covered by contracts with both SEPTA and the State of New Jersey.

The SEPTA and State of New Jersey trains operate in conjunction with the 200-series trains to form a total service pattern. The 200-series trains cannot be effectively separated from the other local trains operated by Penn Central in conjunction with SEPTA and the State of New Jersey. The 200-series trains honor all tickets honored on the other trains except one-way bargain coach tickets, a form of ticket which is only applicable within Pennsylvania.

During 1970 revenue passengers on the 200-series trains using multiple-ride tickets (commuter tickets) represented 53.2 percent of the passengers on the trains and produced 29.2 percent of the revenue. Other than multiple-ride tickets represented 46.8 percent producing 70.8 percent of the revenue. For the first quarter of 1971 multiple-ride tickets amounted to 55 5/10 percent or 30.7 percent of

the revenue, while other than multiple-ride tickets produced 44 5/10 or 69.3 percent of the revenue.[7]

In contrast with all the Penn Central commuter service, Penn Central operates only 40 other trains for Amtrak between New York and Washington via Philadelphia 30th Street Station. Four of these are New York-Florida trains and 18 of the remaining trains are Metroliners. Of the 40, 4 trains operate between New York and North Philadelphia as part of New York-Chicago or New York-Pittsburgh service.

The above pattern of train operation shows that the 200-series trains are logically and realistically part of the Penn Central commuter service rather than Amtrak's intercity service. This conclusion is further evidenced by the fact that the bulk of the patronage on these 200-series trains is traveling within New Jersey or between New Jersey and New York. The travel is primarily not between Philadelphia and New York although the service is important to Philadelphia and Pennsylvania. See appendixes D and E.

There are 13 200-series trains moving from New York to Philadelphia. Seven of them operate in the rush hours.[8] In the other direction from Philadelphia to New York there are nine trains of which five or 55 percent run during the peak hours. In both directions 27 percent of the passengers on these 200-series trains involve Philadelphia. The balance of 73 percent are obviously much more local and much more short haul. There are a total of 8,330 seats all day long of which 6,300 are in the rush hour or the peak hours. Of these 8,330 seats provided on a weekday, only 18.5 percent of them are occupied by Philadelphia passengers going to distant points (distant meaning 90 miles to New York). Therefore, the other 81.5 percent are local or short-haul commuters. All 200-series trains honor all reduced fare tickets except Pennsylvania bargain tickets. In the 200-series the maximum number of stops over the distance between Philadelphia and New York is 10 or an average of 1 every 9 miles and the minimum is 3 or an average of 1 every 30 miles.

Insofar as trains Nos. 22, 23, 176, and 177 are concerned, these trains do not operate solely in the State of New Jersey. Trains Nos. 22 and 23 operate between New York, N.Y., and Chicago, Ill., while trains Nos. 176 and 177 operate between Boston, Mass., and

[7] Multiple-ride tickets were considered as monthly commutation tickets only. They did not include weekend tickets, bargain tickets, ladies day tickets, et cetera. Of the 10.4 percent of passengers that are using other than multiple-ride tickets, such passengers use tickets as 1-day bargain tickets, ladies day tickets, et cetera. Furlough tickets amounted to 0.2 percent and coach party tickets amounted to 0.2 percent.

[8] Peak hours are defined as arriving in either New York or Philadelphia before 9 a.m. and leaving either city sometime between 4 p.m. and 6:30 p.m.

Washington, D.C. All four trains serve a number of stations along the route with trains Nos. 22 and 23 serving approximately 40 municipalities, between its termini, of which only 2 are in New Jersey. The route of these trains was 907 miles in length. Trains Nos. 176 and 177 serve 17 communities along its route of which only 2 also are in New Jersey. The route of these trains is 458 miles. The schedules of trains Nos. 22 and 23 are based primarily on arrivals and departures at their origins and final termini. Both trains were scheduled to depart in the middle of the day in order to provide early morning arrivals in New York or Chicago. Trains Nos. 176 and 177 were overnight trains between Boston and New York. Train No. 22 is the only service which might be considered as arriving in New York during early morning rush periods. While some commutation train transportation may be provided by the respective runs of these trains this in no way changes the intercity nature of these four trains. Trains Nos. 22, 23, 176, and 177 are operated with conventional intercity equipment consisting of electric and diesel locomotives, coaches and sleeping cars with food and beverage service. Train No. 22 leaves Chicago at 10:45 a.m. daily and arrives at 30th Street Station, Philadelphia, to discharge passengers at 5:22 a.m. Its next stop is Trenton, N.J., at 6:21 a.m., stops Newark, N.J., to discharge passengers at 7:12 a.m., and arrives in New York at 7:45 a.m. Train No 23 leaves New York at 1:30 p.m., stops at Newark at 1:45 p.m., at Trenton at 2:31 p.m., at Philadelphia at 3:02 p.m., and then after making numerous stops arrives in Chicago at 7:40 a.m. See appendix F. Train No. 176 operates between Washington, D.C., and Boston for a total mileage of 458 miles. It leaves Washington at 10:15 p.m., arrives at 30th Street Station, Philadelphia, at 12:51 a.m., North Philadelphia at 1:01 a.m., Trenton at 1:31 a.m., Newark at 2:24 a.m., and arrives in New York at 2:49 a.m. It then continues on to Boston making numerous stops, arriving in Boston at 8:25 a.m. Train No 177 leaves Boston at 9:45 p.m. and after numerous stops arrives in New York at 2:58 a.m., leaves New York at 3:23 a.m., arrives in Newark at 3:38 a.m., Trenton at 4:27 a.m., North Philadelphia at 5 a.m., 30th Street Station in Philadelphia at 5:09 a.m. and then after several more stops arrives in Washington at 7:50 a.m. See appendix G. No evidence was submitted by the State of New Jersey as to the commuter or short-haul nature of these trains. In fact the witness for New Jersey, in his statement, alluded to the possible violation of its contract with Penn Central as to the procedure followed in the notice of discontinuance of these trains, but also stated that,"***we are not at this time requesting their restoration."

The Honorable Milton J. Shapp, Governor of the Commonwealth of Pennsylvania, testified as to the nature of the service of the 200-

series trains, and contends that this train service linking Philadelphia and New York is essential to the economy of Pennsylvania.

Harry J. McNally, Jr., a professional engineer who lives in Ardmore, Pa., commutes between his home and New York City approximately three times a week or more. He prefers using the train rather than driving his own car into New York because of the driving conditions and parking situation in New York. A discontinuance of the 200-series train service or any downgrading of commuter service could affect his travel situation so drastically as to cause him economic reverses requiring him to move his residence to New York which he is not desirous of doing.

A witness for Penn Central testified that the 200-series trains are included in the High Speed Ground Transportation contract between the Department of Transporation-Federal Railroad Administration and Penn Central. The railroad must get FRA approval prior to changes in schedules and fares. Other than such control over the 200-series operation, the witness was unaware of any additional obligation by the carrier under the agreement as it might relate to the 200-series trains.

As heretofore indicated, this investigation was instituted as a result of a court order requesting a determination by this Commission as to whether certain trains enumerated herein provide commuter or short-haul service or are intercity in nature under the criteria of the Amtrak Statute and *Penn Central Transp. Co. Discontinuance* (The *Penn Central* case), 338 I.C.C. 318 (1971).

In the *Penn Central* case, we discussed the legislative history of the Amtrak Statute and elaborated on the statutory mandates contained in section 102(5). We set forth certain criteria, some or all of the following features to be considered in determining the issue of whether a particular train operation is within the "commuter or other short-haul service" exclusion:

(1) The passenger service is primarily being used by patrons traveling on a regular basis either within a metropolitan area or between a metropolitan area and its suburbs;

(2) The service is usually characterized by operations performed at morning and evening peak periods of travel;

(3) The service usually honors commutation or multiple-ride tickets at a fare reduced below the ordinary coach fare and carries the majority of its patrons on such a reduced fare basis;

(4) The service makes several stops at short intervals either within a zone or along the entire route;

(5) The equipment used may consist of little more than ordinary coaches;

(6) The service should not extend more than 100 miles at the most, except in rare instances; although service over shorter distances may not be commuter or short-haul within the meaning of the exclusion.

On joint brief, the Commonwealth of Pennsylvania, PUC and city of Philadelphia request that we reconsider our order of May 6, 1971, and delete all reference to the criteria specified in the *Penn Central* case. We have reconsidered our order of May 6, 1971, and hereby deny that request. We are aware that the underlying factual findings necessarily are different in the *Penn Central* case than in the subject proceeding; however, insofar as the criteria set forth in the *Penn Central* case can be utilized to determine whether the involved transportation is "intercity rail passenger service" within the meaning of section 102(5) of the Amtrak Statute, we believe they are applicable and should be considered in our determination herein.

For reasons hereafter given, we view the involved Penn Central service provided by the 200-series trains between Philadelphia and New York as "commuter and other short-haul service"; and that trains Nos. 22, 23, 176, and 177 within the State of New Jersey to be that of "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970.

200-Series Trains

By our report in *Penn Central Transp. Co.—Status of Passenger Serv.* 338 I.C.C. 621 (1971) we found that the first criterion set forth in the *Penn Central* case too narrowly construed the scope of the exclusion in section 102(5)(A) of the Amtrak Statute. We observed that the express language of that statute, i.e. "commuter and other short-haul service in metropolitan and suburban areas" indicated that such service could reflect an operation between metropolitan areas, as here, bearing in mind that the exempted service is also "usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations."

There can be no question that the 200-series trains meet the first criterion, as just discussed. The majority of the passengers on these series of trains travel regularly to and from work each day. The evidence indicates that 63 percent of the patronage on the 200-series trains is within New Jersey or between New Jersey and New York during peak hours. Between the termini of New York City and Philadelphia there are four metropolitan areas, three contiguous and one overlapping. Each area has a city with a population of over 50,000. The suburbs of these cities are now bordering on each other, so that it is difficult to differentiate between them. This corridor is one of the most densely populated in the United States and could easily be considered as one continuous suburban area to each of the large metropolitan areas were it not for the political subdivisions.

The second criterion set forth above is clearly met by the 200-series trains. Seven of the 13 trains in this series from New York to Philadelphia operate during the morning and evening rush hours. In the opposite direction five of the nine weekday trains operate during peak hours. Furthermore, 71 percent of the available seats are usable during rush hours, and 75 percent of the patronage on this series of trains occurs during these hours.

The next guideline as to the availability and use of commutation or multiple-ride tickets at fares below the ordinary coach fare has also been established. As heretofore noted, the bargain ticket, the monthly ticket and the multiple-ride ticket when regularly used are all below the cost of the ordinary coach ticket (regular ticket), and the knowledgeable and frequent commuters seldom utilize the regular ticket. A witness for Penn Central indicated that 53.2 percent of the patrons on the 200-series trains use multiple-ride tickets, and that basically the passengers in this area purchase monthly or commutation tickets. Another 10.4 percent of the passengers used the reduced rate fares, such as weekend excursions, ladies day and other types of bargain tickets, so that 63.6 percent of all the passengers on these trains used the commuter and/or some form of a reduced rate ticket. This percentage is somewhat higher since it does not include reduced rate military furlough, clergy and a few other restricted bargain type tickets. Thus, under this criterion—the reduced fare basis—the commutation character of the involved rail service is apparent.

The frequency as well as the distance interval of stops, either within a zone or along the entire route, next comes into focus. Appendix A, attached hereto, shows the total distance of the 200-series trains to be 90.5 miles. As previously stated each train does not stop at each and every station, but the 200-series trains do stop at all of the stations. They operate within zones serving one or more of the major industrial cities along the route, as well as smaller educational centers such as Princeton Junction. Stops are made between communities as close as 3.3 miles apart, with the maximum length of run between stops being 18.1 miles. This service is designed specifically to serve the short-haul and/or commuter type of person who is interested in going from a suburban area to a large urban or metropolitan center or from an urban or suburban area to their place of work and return home. It is not the type of service used by people who go to a distant city for 3, 5, or 7 days at a time, but for those who go to the large city every day for business reasons or occasionally for shopping or entertainment and return the same day at their convenience. Thus, the fourth criterion has been proven to exist.

The equipment used on the 200 series consists of little more than ordinary coaches of every type imaginable from city of Philadelphia owned and New Jersey owned electric commuter cars to intercity coaches replaced on intercity runs by newer equipment or old converted sleeping cars revamped for short-haul passenger coach service. Some trains in this series do carry a snackbar for light refreshment only. The fifth criterion is therefore met.

In considering the sixth criterion we find that the 200-series of trains is well within the first clause thereof in that the total distance between the termini is only 90.5 miles. However, the second part thereof appears to require some discussion, "***although service over shorter distances may not be commuter or short-haul within the meaning of the exclusion." A careful examination of the evidence herein indicates that the least amount of passengers are those traveling the full distance from New York to Philadelphia and in the reverse direction. Such tends to indicate that these passengers do not travel strictly between the termini but rather from and/or to outlying areas. In addition to the two large metropolitan centers of New York City and Philadelphia, we have the additional metropolitan areas of Trenton, a city of over a hundred thousand population as well as the capital of the State, and the two large industrial cities of Jersey City, N.J., and Newark both of which have their own large suburban area and in addition serve as suburban housing areas for New York City. There are more commuters who travel shorter distances in New Jersey than in Pennsylvania, due of course to the heavier concentration of population between Trenton and New York, than between and Philadelphia. The shorter distances traveled by the New Jersey commuter accounts for the fact that the percentage of commuters among New Jersey passengers is higher than the Pennsylvania commuters. This indicates, of course, that this passenger service is definitely commuter or short haul in nature, since the majority of passengers are traveling between the suburban metropolitan areas for short periods of time.

In view of the fact that Railpax preserves the discontinuance procedures of section 13a as to "commuter" trains, a brief review of prior Commission policy in this area appears feasible. The Commission has clearly and repeatedly indicated that discontinuance of commuter operations under section 13a may be authorized only under the most compelling circumstances. We are fully cognizant of the vital role played by commuter service in the day-to-day life of patrons. Commuter fares have repeatedly been mentioned as "an essential item" in the budget or cost of living of the person traveling

to or from work. *Penn Central Fare Revision—1969*, 335 I.C.C. 720, 744 (1970); *Jersey Central Commutation Fares*, 273 I.C.C. 693, 705 (1949). In rejecting a proposed commuter discontinuance, the Commission noted (in terms arguably applicable to numerous potential commuter cases) that discontinuance "***would disrupt the mode of living" of the riders, possibly requiring them either to give up jobs or abandon homes—to the detriment of the comfort and well being of their familes. *Louisville & N. R. Co. Discontinuance of Services*, 307 I.C.C. 173, 186 (1959). In our 1968 report and recommendations to the Senate Committee on Commerce and the House Interstate and Foreign Commerce Committee we recognized that "intercity" travelers were unlike commuters, many of whom "***have no practical or economical alternatives to rail commutation***" House Hearings Before Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, 90th Cong. 2d Sess. (1968) at page 52.

From the above discussion, it is apparent that the 200-series trains provide a commuter service as opposed to an intercity service, and we so conclude. Accordingly, the involved service falls within the exclusion of section 102(5) and is not "intercity rail passenger service" within the meaning of section 102(5) of the Amtrak Statute.

Trains Nos. 22, 23, 176, and 177 cannot be considered as being either commuter or other short-haul service. As herein discussed in order to fall within the commuter or other short-haul service exclusion of the Amtrak Statute, the service under consideration must meet two basic statutory criteria, namely: (1) that of being "commuter and other short-haul" service; and (2) the service must be in "metropolitan and suburban areas [which service is] usually characterized by reduced fare, multiple-ride and commutation tickets, and by morning and evening peak period operations***."

The record indicates that trains Nos. 22 and 23 operate between New York City and Chicago, Ill., and that trains Nos. 176 and 177 operate between Boston and Washington, D.C. The fact that they go through the densely populated corridor between New York and Philadelphia and pick up some passengers in doing so is only incidental to the main object or purpose of these trains. It differs entirely from the 200 series in that the criteria of the *Penn Central* case to these four trains is inapplicable. The mileage transversed is over 700 miles and over 400 miles, respectively. Their consist is made up of equipment to accommodate the long-haul passenger rather than the short-haul passenger or commuter. The majority of the people traveling on these trains do not do so on a day-to-day

basis either within a metropolitan area or its suburbs. It is true that some passengers travel on these trains with commuter tickets short distances, but they are in the minority, and can be accommodated on the 200-series trains, as well as numerous other commuter trains operating in the corridor. Applying the rationale as we did to the 200 series, that commuter or short-haul service may be between contiguous metropolitan areas, the characteristics of these trains are such that they clearly indicate them to be "intercity" and not within the exemption of section 102(5) of the Rail Passenger Act of 1970.

Furthermore, although the State of New Jersey questioned whether these trains within the State of New Jersey constituted intercity rail passenger service in the United States District Court for the Eastern District of Pennsylvania, at the hearing they submitted no evidence as to these trains, and the director, Division of Public Transportation, Department of Transportation, State of New New Jersey, stated that although New Jersey believed that the notice of discontinuance of these trains was a violation of the contract between the State and Penn Central, that State at this time is not requesting their restoration.

Contentions of the parties not specifically discussed herein have been considered and found without material significance and are not necessary for a disposition of this proceeding.

FINDINGS

We find that trains Nos. 200 through 298, between Philadelphia, Pa., and New York, N.Y., do not constitute "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970, but are "***commuter and other short-haul service***" within the exemption thereof. We also find that trains Nos. 22, 23, 176, and 177, within the State of New Jersey, constitute "intercity rail passenger service" within the meaning of section 102(5) of the Rail Passenger Service Act of 1970.

No order is necessary. Our findings and conclusions herein shall be forwarded to the United States District Court for the Eastern District of Pennsylvania pursuant to that court's request.

COMMISSIONER TUGGLE whom VICE CHAIRMAN HARDIN and COMMISSIONERS MURPHY and BREWER join, dissenting in part:

On the face of the matter, I would be inclined towards the view that trains operating between New York and Philadelphia, two of the largest metropolitan areas in the country should logically be

classified as being intercity in nature, unless there was convincing evidence to the contrary. For the reasons that I will discuss below, I find no such persuasive evidence on this record, and thus, I must respectfully disagree with the conclusion of the majority that the 200-series trains fall within the commuter exclusion of the Amtrak Statute.

As found by the majority in *Penn Central Transportation Co.—Status of Passenger Serv.* 338 I.C.C. 660 (the Chatham case), there are two basic tests under section 102(5)(A) of the Amtrak Statute which must be satisfied in order for a particular service to come under the purview of the "commuter or other short-haul" classification. These are the geographic tests, i.e., the physical nature of the service, and the primary use test, i.e., the operational nature of the service in question. In the Chatham case, we found that those trains failed to meet both tests in that Chatham was located outside of the New York metropolitan area and the trains were not used primarily by commuters.

In the case now before us, it appears that the use of these trains by commuter patrons, mainly between New York and various New Jersey points, is incidental to the basic function of providing through service between New York and Philadelphia. Along this line of thought, the record shows that during 1970 multiple-ride tickets represented a slight majority of 53.2 percent of the passengers on the 200-series trains *and produced but 29.2 percent of the revenues on the trains.* By way of contrast, other than multiple-ride tickets represented a number of passengers similar to the multiple-ride users, 46.8 percent, but most importantly, the nonmultiple-ride users *produced 70.8 percent of the revenue on these trains.* It is apparent from these figures that the great majority of rider support for the trains, in terms of fares collected, came from other than multiple-ride users. Thus, the *raison d'etre* for the operation of these trains by the railroad was to provide through service, for without the revenue support of these passengers, the trains might have been discontinued a long time ago. Such a fact would tend to augment the basic conclusion that the primary function of the trains has been to provide through service and that commuter usage has been incidental to this central mission. So, I am of the opinion that these trains do not meet the primary use test, and I also feel that another facet of this record indicates that these trains do not fulfill the "commuter or other short-haul" designation.

At sheets 8 and 9 in the majority report, reference is made to the following:

The entire area between Philadelphia and New York is laced with various rail commuter service. In addition to the 23 weekday 200-series trains there are 169 *other commuter trains* on the line operated by Penn Central. [Emphasis supplied.]

These "other commuter trains" operate between Philadelphia-Trenton (42), Trenton-New York (25), New Brunswick-New York (49), Rahway-New York (15), Bay Head-New York (20), and South Amboy-New York (18). I am of the view that there is a distinct difference in the nature of the service provided by these 169 trains, as compared to the trains herein, and that a discussion of the distinction might add yet another indicia of what constitutes "commuter or other short-haul" service.

First, it would appear that none of these 169 trains would have any difficulty in meeting the "short-haul" requirement in the geographic test, and that few, if any, would likewise meet any significant problem in satisfying the second requirement of the geographic test—the requirement of the service being "in metropolitan and suburban areas." Yet, these trains share another feature which reflects on the situation now under consideration. Thus, it is seen that these trains form a regular *radial pattern* of operation in the sense that the trains operate from outlying points of the metropolitan-suburban complex *into* the heart of the urban center, in this case either New York or Philadelphia, with regular return operations. These points can be characterized as being "satellites" in the "orbit" of either New York or Philadelphia. Admittedly, under the "contiguous metropolitan area" theory expounded by the majority, a point such as Trenton could as readily be said to be in the "orbit" of either of these major cities as the other. However, the 169 commuter trains form a radial pattern of regular operations to and from a particular urban center in the sense that the Philadelphia-Trenton trains are oriented upon Philadelphia and the Trenton-New York trains are oriented upon New York, rather than operating *through* Trenton to serve both major termini as is the case with the subject trains. Likewise, these 169 commuter trains can be said to be segmented in that they serve as spokes in the radial pattern of short-haul commuter service being furnished to and from an urban center.

The majority report makes much of the fact that 63 percent of the patronage on the 200-series trains is within New Jersey or between New Jersey and New York during peak hours. This evidence is the basis for the conclusion that these trains are performing a primarily short-haul type of commuter service. At this point, it is obvious that the theory of the majority is in direct conflict with the theory that I

profess. I would say that the *usage* of these trains by a majority of passengers as a short-haul commuter service does not overcome the basic facts that: (1) the majority revenue support for the trains comes from the noncommuter; (2) this is a nonradial type of service *between* two of the largest urban centers in the Nation, rather than *in* "metropolitan and suburban areas."

Also, I have great conceptual difficulty in seeing how commuter usage for the short haul between New York and New Jersey points can result in the *whole* service being classified as "commuter or other short-haul." It is basic in our determinations under section 102(5)(A) that we cannot segment the trains under consideration. Either all of the service comes under the commuter exclusion, or it does not. The 169 trains referred to by the majority as being "other commuter trains" represent what I would call a true local, short-haul commuter service. There, the schedules of the trains are broken down into logical segments which act as the spokes in a radial pattern of operation. *The short-haul usage by commuters falls within the framework of the physical limitations of the service and cannot be said to be incidental to the overall purpose of the service, as is the case with the subject trains.* In point of fact, the subject trains provide the precise example of what Senator Winston Prouty had in mind when he stated that "***an intercity train which incidentally happens to pick up commuters, nevertheless, would be part of the system." (Cong. Rec. May 5, 1970, page S6666). Accordingly, I would conclude that the 200-series trains satisfy neither the geographic nor the primary use tests and thus do not fall within the commuter exclusion of section 102(5)(A) of the Amtrak Statute.

Finally, I am in agreement with the conclusion of the majority that trains Nos. 22, 23, 176, and 177 constitute "intercity rail passenger service" pursuant to the Amtrak Statute.

CHAIRMAN STAFFORD did not participate.

Dated at Washington, D.C., this 26th day of July 1971.

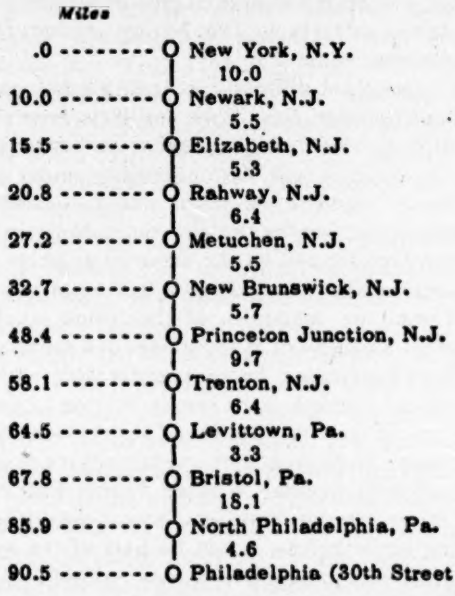
By the Commission.

(SEAL)

ROBERT L. OSWALD,
Secretary.

APPENDIX A

Straight line diagram map of Penn Central Transportation Co. route between New York, N.Y., and Philadelphia, Pa.



The above map indicates all stations served by the 200 through 298 series trains between New York, N.Y., and Philadelphia, Pa., and also trains Nos. 22, 23, 176, and 177 within the State of New Jersey. However, none of these trains stop at all of these stations.

APPENDIX B

Population—1970-1960

Route: New York-Philadelphia	Local population		Metropolitan area	
	1970	1960	1970	1960
New York City, N.Y	7,867,760	7,781,984	11,528,649	10,694,633
Newark, N.J	382,417	405,220	1,856,556	1,689,420
Elizabeth, N.J	112,654	107,698	----------	----------
Rahway, N.J	29,114	27,699	----------	----------
Metuchen, N.J	16,031	14,041	----------	----------
New Brunswick, N.J	41,885	40,139	----------	----------
Princeton Junction, N.J. (Princeton)	12,311	11,890	----------	----------
Trenton, N.J	104,638	114,167	303,968	242,401
Levittown, Pa[1]	188,840	115,316	----------	----------

Population—1970-1960—Continued

Route: New York-Philadelphia	Local population		Metropolitan area	
	1970	1960	1970	1960
Bristol, Pa	12,085	12,364	--------	--------
North Philadelphia, Pa. —included in Philadelphia—	--------	--------	--------	--------
Philadelphia, Pa	1,948,609	2,002,512	4,817,810	4,342,847

[1] Levittown is comprised of portions of three townships (Middletown, Bristol, and Falls townships).

Source.—U.S. Department of Commerce/Bureau of the Census.

APPENDIX C

Passaic County
Bergen County
Morris County
Essex County
NEW YORK
Bronx
Newark
Union County
Elizabeth
SMSA
Raritan
Staten Island
Perth Amboy
Somerset County
Reading Sys.
Atlantic Ocean
New Brunswick
Bucks County
Belle Mead
Hopewell
Middlesex County
MERCER
Princeton Jct.
West Trenton
SMSA*
TRENTON
Montgomery County
Philadelphia
Levittown
Jenkintown
Bristol
Philadelphia
Wayne Junction
North Philadelphia
SMSA
30th St.
Center
Burlington County
Delaware County
Camden County
Gloucester County
*Standard Metropolitan Statistical Area
Penn Central Line
PHILADELPHIA to NEW YORK

APPENDIX D

Philadelphia-New York 200-series Penn Central trains

Train No.	Philadelphia time	Cars	Seats	Philadelphia passengers	Philadelphia	Seats peak trains
					Percent	
201	8:45 a.m.	3	210	121	63	210
207	10:15 a.m.	4	280	88	31	--------
211	1:30 p.m.	4	280	182	65	--------
213	3:40 p.m.	5	350	169	48	--------
219	5:46 p.m.	13	910	238	26	910
215	6:05 p.m.	16	1,120	285	25	1,120
221	6:40 p.m.	17	1,190	214	18	1,190
265	7:07 p.m.	13	910	19	2	910
223	7:18 p.m.	17	1,190	170	14	1,190
225	7:45 p.m.	11	770	76	10	770
227	8:42 p.m.	8	560	58	10	--------
231	12:44 a.m.	5	350	145	41	--------
235	1:49 a.m.	3	210	50	24	--------
			8,330	1,825	22	8,300
254	6:33 a.m.	17	1,190	247	21	1,190
200	7:00 a.m.	17	1,190	230	19	1,190
202	8:00 a.m.	14	980	600	61	980
256	8:05 a.m.	8	560	57	10	560
204	9:00 a.m.	9	630	300	48	--------
206	10:15 a.m.	10	700	225	32	--------
212	1:00 p.m.	[1]6	420	138	32	--------
218	3:00 p.m.	[1]9	630	190	30	--------
220	5:00 p.m.	8	560	300	54	560
			6,860	2,282	33	4,480
Weekday total			15,190	4,107	27	10,780 (71%)
			Nonweekday trains			
234	k7:00 a.m.					
280	s9:00 a.m.					
298	s7:00 p.m.					
272	k7:17 p.m.					
282	s9:15 p.m.					

[1] Eight additional deadhead cars.

APPENDIX E

Analysis of exhibit No. 13 "On"-"Off" Study

WEEK OF NOVEMBER 18-21, 1970

Train No.	New Jersey passengers	Total passengers
200	5,497	8,147
201	515	1,364
202	375	5,489
204	1,508	3,128
206	1,082	2,062
207	642	1,166
211	937	1,814

Analysis of exhibit No. 13 "On"-"Off" Study—Continued

WEEK OF NOVEMBER 15-21, 1970—Continued

Train No.	New Jersey passengers	Total passengers
212	1,022	1,540
213	519	1,916
215	1,936	3,334
218	413	1,849
219	3,100	5,534
220	677	2,339
221	4,043	6,592
223	5,039	6,759
225	4,390	5,201
227	2,316	3,179
231	1,222	1,999
234	242	395
272	49	196
282	65	196
298	241	572
235	640	1,180
254	7,059	9,416
256	2,670	3,307
263	4,800	4,940
	50,972	60,717

Note.—Totals do not include train No. 207 on 1 day; 218 on 1 day; 225 on 1 day; 227 on 1 day; 235 on 1 day; and 280 on 1 day.

Source.—Exhibit No. 13.

Passengers originating at points in New Jersey destined to N.J. points or New York, N.Y., and passengers originating at New York, N.Y., or N.J., points destined to N.J. points constitutes *63 percent* of all passengers utilizing 200-series passenger trains.

APPENDIX F

Schedule of trains Nos. 22 and 23 between New York, N.Y. and Chicago, Ill.

EFFECTIVE PRIOR TO MAY 1, 1971

Read down Train No. 23 daily			Read up Train No. 22 daily
		New York	
1:30 p.m.	Lv.	New York ---------- Ar.	7:45 a.m.
1:45 p.m.		Newark ---------- (46.1 miles)	D 7:12 a.m.
		New Jersey	
2:31 p.m.		Trenton ---------- (46.1 miles)	6:21 a.m.
		Pennsylvania	
R 3:02 p.m.		North Philadelphia ----------	----------
----------		30th Street Station ----------	D 5:22 a.m.
3:40 p.m.		Paoli ----------	4:50 a.m.
4:00 p.m.		Coatesville ----------	----------
4:27 p.m.		Lancaster ----------	4:03 a.m.

Schedule of trains Nos. 22 and 23 between New York, N.Y. and Chicago, Ill.—Continued

EFFECTIVE PRIOR TO MAY 1, 1971—Continued

Read down Train No. 23 daily			Read up Train No. 22 daily
		Pennsylvania—Continued	
5:03 p.m.	Ar.	Harrisburg	Lv. 3:30 a.m.
5:20 p.m.	Lv.	Harrisburg	Ar. 3:15 a.m.
6:31 p.m.		Lewistown	2:04 a.m.
6:54 p.m.		Mount Union	----------
7:10 p.m.		Huntingdon	----------
7:40 p.m.		Tyrone	----------
8:02 p.m.		Altoona	12:30 a.m.
9:10 p.m.		Johnstown	11:20 p.m.
9:58 p.m.		Latrobe	10:36 p.m.
10:11 p.m.		Greensburg	10:23 p.m.
10:46 p.m.		Wilkinsburg	9:49 p.m.
11:05 p.m.	Ar.	Pittsburgh	Lv. 9:35 p.m.
11:30 p.m.	Lv.	Pittsburgh	Ar. 9:05 p.m.
11:48 p.m.		Sewickley	8:45 p.m.
12:05 a.m.		Rochester	8:29 p.m.
12:13 a.m.		Beaver Falls	8:19 p.m.
		Ohio	
----------		E. Palestine	F 7:52 p.m.
1:30 a.m.		Salem	7:30 p.m.
1:22 a.m.		Alliance	7:12 p.m.
1:50 a.m.		Canton	6:55 p.m.
----------		Massilon	6:40 p.m.
----------		Orrville	F 6:24 p.m.
F 2:25 a.m.		Wooster	6:08 p.m.
3:08 a.m.		Mansfield	5:27 p.m.
3:30 a.m.		Crestline	5:01 p.m.
----------		Bucyrus	F 4:45 p.m.
----------		Ada	F 3:53 p.m.
4:43 a.m.		Lima	3:38 p.m.
----------		Van Wert	3:08 p.m.
		Indiana	
5:45 a.m.		Fort Wayne	2:29 p.m.
6:34 a.m.		Warsaw	1:47 p.m.
6:54 a.m.		Plymouth	1:28 p.m.
P 6:25 a.m.		Valparaiso	----------
6:50 a.m.		Gary	11:25 a.m.
		Illinois	
D 7:16 a.m.	Ar.	Englewood	R 11:01 a.m.
7:40 a.m.		Chicago	Lv. 10:45 a.m.

R—Stops only to receive passengers.
P—Stops Saturday and Sundays.
D—Stops to discharge passengers.
F—Flag stop.
Note.—Overall mileage of train route between New York-Chicago is 907 miles.

APPENDIX G

Schedule of trains Nos. 176-177 between Boston, Mass. and Washington, D. C.

EFFECTIVE PRIOR TO MAY 1, 1971

Read down Train No. 177 except Saturday			Read up Train No. 176 daily
		Massachusetts	
9:45 p.m.	Lv.	Boston ---------- Ar.	8:25 a.m.
9:50 p.m.		Back Bay Station ----------	8:20 a.m.
10:06 p.m.		Route 128----------	8:03 a.m.
		Rhode Island	
10:52 p.m.		Providence----------	7:20 a.m.
---------		Kingston----------	6:52 a.m.
---------		Westerly----------	6:32 a.m.
		Connecticut	
11:58 p.m.		New London----------	5:59 a.m.
12:53 a.m.	Ar.	New Haven---------- Lv.	4:45 a.m.
1:16 a.m.	Lv.	New Haven---------- Ar.	5:05 a.m.
---------		Bridgeport ----------	u 4:25 a.m.
		New York	
2:58 a.m.	Ar.	New York---------- Lv.	3:15 a.m.
3:23 a.m.	Lv.	New York---------- Ar.	2:49 a.m.
		New Jersey	
3:38 a.m.		Newark----------	2:24 a.m.
		(48.1 miles)	
4:27 a.m.	Ar.	Trenton---------- Lv.	1:31 a.m.
		Pennsylvania	
5:00 a.m.		North Philadelphia-- ----------	1:01 a.m.
5:09 a.m.		30th Street, Philadelphia ----------	12:51 a.m.
		Delaware	
5:48 a.m.		Wilmington----------	12:04 a.m.
		Maryland	
6:59 a.m.		Baltimore----------	10:55 p.m.
		District of Columbia	
7:50 a.m.	Ar.	Washington---------- Lv.	10:15 p.m.

u—Stops Sundays and holidays.

Note.—Overall mileage of train route between Boston-Washington is 455 miles.

SUPREME COURT, U. S.

FILED
MAY 20 1975

No. 74-1331

In the Supreme Court of the United States

October Term, 1974

CITY OF PHILADELPHIA, et al.,
Petitioners,

vs.

GEORGE P. BAKER, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

BRIEF IN OPPOSITION FOR NATIONAL RAILROAD PASSENGER CORPORATION

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In the
Supreme Court of the United States

October Term, 1974

No. 74-1331

CITY OF PHILADELPHIA, et al.,
Petitioners,

v.

GEORGE P. BAKER, et al.,
Respondents.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit**

BRIEF IN OPPOSITION FOR NATIONAL RAILROAD PASSENGER CORPORATION

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 508 F.2d 279 and is reproduced in the Appendix to the Petition at 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that these actions are barred by reason of Title II of the Rail Passenger Service Act of 1970 on the ground that they seek to overturn determinations made by the Secretary of Transportation as part of his designation of a Basic System of intercity rail passenger transportation, which determinations are not "reviewable in any court" by reason of Section 202 of that Act, 45 U.S.C. § 522.

2. Whether, in any event, these actions are barred by reason of Section 307(a) of the Rail Passenger Service Act of 1970, 45 U.S.C. § 547(a), on the ground that such actions are maintainable, if at all, only by the Attorney General of the United States.

STATUTES INVOLVED

The statutes principally involved are Sections 201 and 202 of the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 521 and 522, which are set out in the Petition (Pet. 4-5), and Section 307(a) of such Act, 45 U.S.C. § 547(a), which is set out below.

> "§ 547. Jurisdiction of the district courts of the United States to impose sanctions
>
> "(a) If the Corporation [i.e., respondent] or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district

in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

STATEMENT OF THE CASE

Petitioners are the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission and the United Transportation Union.[1] Respondents are the Trustees of the Property of Penn Central Transportation Company, Debtor (the "Trustees"), National Railroad Passenger Corporation ("Amtrak") and the United States.

The Trustees and Amtrak contracted in April, 1971 pursuant to pertinent provisions of the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.* (the "Act"), to relieve the Trustees from their responsibility for provision of intercity rail passenger service. On May 1, 1971, as a result of this contractual arrangement and pursuant to Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1), the Trustees discontinued certain trains at issue here: their 200-series trains between Philadelphia and New York City and their 600-series trains between Philadelphia and Harrisburg (collectively, the "Trains").[2]

---

[1] The State of New Jersey had participated as a complaining party up to the time of oral argument in the Court of Appeals. It appeared at that argument to announce that it was dismissing its complaint, with prejudice, and subsequently filed a Stipulation of Dismissal. (508 F.2d at 280 n.2; P. App. 5a n.2).

[2] Since May 1, 1971, Amtrak has operated its own intercity service between the two city pairs.

The Trains had previously been identified by the Secretary of Transportation in his Final Report to Congress dated January 28, 1971 pursuant to Title II of the Act as trains then operated by the Trustees over routes designated by him as part of the "Basic System" of intercity rail passenger service which he was required to designate under, and which is not "reviewable in any court" by reason of, such Title II.[3] (45 U.S.C. §§ 521 and 522).

On April 28, 1971, petitioners filed suit in the United States District Court for the Eastern District of Pennsylvania charging that the Trustees' proposed discontinuance of the Trains would violate the Act on the ground that the Trains were commuter rather than intercity trains. The District Court was asked to enjoin the Trustees from implementing the discontinuances and to refer the question of the intercity versus commuter character of the Trains to the Interstate Commerce Commission (the "ICC") under 28 U.S.C. § 1336(b).

On April 30, 1971, in the Penn Central reorganization proceedings it was ordered that petitioners "proceed forthwith before the Interstate Commerce Commission to the end that this Court shall be advised" concerning the intercity versus commuter character of the rail service involved. (Order No. 244 appended hereto at R. App. 1a). The Reorganization Court carefully refrained from characterizing the legal effect of the "advice" which it sought from the ICC, noting that "it is unnecessary to decide the precise basis for referral". (329 F. Supp. at 577; P. App. 22a).

On June 24, 1971 and July 26, 1971, the ICC rendered reports in which it stated that in its view the Trains were not intercity rail passenger service within the meaning of the Act. *Penn Central Transportation Company*

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[3] See Section I below. A copy of the Final Report was annexed as Exhibit I to Amtrak's Memorandum in the District Court dated December 1, 1971 in Support of its Motion to Dismiss. Pertinent pages therefrom are appended hereto at R. App. 3a-8a.

(Debtor) — Status of Certain Passenger Service, 338 I.C.C. 621 and 690 (1971); P. App. 34a and 73a. The ICC issued no orders. It expressly found in each case that "no order is necessary". (338 I.C.C. at 641 and 703; P. App. 54a and 86a). The reports were issued solely on an advisory basis and as a result of the Reorganization Court's Order dated April 30, 1971 directing that it be "advised" as to the intercity versus commuter character of the Trains. (338 I.C.C. at 622, 641, 691 and 703; P. App. 35a, 54a, 74a and 86a).

On September 22, 1971, petitioners filed a second suit seeking to "enforce" the reports of the ICC.

Amtrak moved in the District Court to dismiss the complaints on the ground that these actions are barred by Sections 202 and 307(a) of the Act, 45 U.S.C. §§ 522 and 547(a). The District Court granted such motions. (370 F. Supp. 22; P. App. 24a).

The Court of Appeals unanimously affirmed (508 F.2d 279; P. App. 1a), holding that the Trustees' discontinuance of the Trains (and Amtrak's decision to operate its own service between the city pairs in question) "were beyond judicial review" because the Trains had been designated as intercity by the Secretary of Transportation in his Final Report to Congress under Section 202 of the Act, 45 U.S.C. § 522, and characterized such Report as "a document culminating a process essentially legislative in nature" which Congress intended to "be subject to review only in the legislative branch". (508 F.2d at 282; P. App. 8a, 9a). Because of its disposition of the controversy on these grounds, the Court of Appeals did not consider it necessary to pass on Amtrak's second contention that, by reason of this Court's decision in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), Section 307(a) of the Act, 45 U.S.C. § 547(a), bars actions such as these unless brought by the Attorney General of the United States. (508 F.2d 283 n.5; P. App. 10a n.5).

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Holding that, Under the Particular Circumstances of This Case, Petitioners Cannot Attack a Non-reviewable Determination of the Secretary of Transportation Does Not Present Any Important or Recurring Question of Law Requiring Consideration by This Court.

This litigation involves a single moment in time more than four years ago – May 1, 1971 – the date by which Congress directed that railroads must contract with Amtrak if they wished to discontinue their intercity rail passenger trains (45 U.S.C. § 561(a)(1)) and the date upon which Congress directed that Amtrak must commence providing intercity rail passenger service (45 U.S.C. § 561(b)). The sole issue which petitioners seek to litigate is the propriety of particular train discontinuances by a particular railroad on that particular day. (Pet. 5, 6).

As their first reason in support of granting the writ, petitioners urge that identification of the "person or agency to determine the commuter character of a passenger train is an important and pressing federal question" (Pet. 9), that the "decision below conflicts with rulings of this Court and in two circuits" *(ibid.)* and that the question presented here should be committed to the "primary jurisdiction and/or expertise" of the ICC. (Pet. 12).

Petitioners do not cite, however, and Amtrak is not aware of, any other cases still pending which present the commuter versus intercity issue with respect to railroad discontinuances effected pursuant to the Act on May 1, 1971. The Trustees discontinued the Trains pursuant to a specific statutory provision which required that such discontinuances be accomplished on May 1, 1971. (45 U.S.C. § 561(a)(1)). Any petition questioning the propriety of action taken on that date under that provision does not present an "important and pressing federal question" of any kind, but is, instead, a request that this Court commit its re-

sources to the disposition of the last remaining controversy challenging train discontinuances in a unique setting where the terms of the Act and the passage of time virtually insure that no comparable case will again arise.

There is no conflict between the decision of the court below and any of the cases relied on by petitioners. (Pet. 9-11). None of these cases involved consideration of Title II of the Act, the statutory provision relied on by the Court of Appeals to dispose of this controversy; and all of such cases were decided before this Court's decision in *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), where this Court held that only the Attorney General of the United States may sue to enforce the provisions of the Act.[4]

Petitioners advance no statutory or other support for the claimed ICC "primary jurisdiction" in respect of railroad discontinuances effected on May 1, 1971. Indeed, although the ICC was a party to the portion of these proceedings which commenced in the Reorganization Court, it did not appear in the Court of Appeals to assert "primary" or any other kind of jurisdiction in this controversy. In fact, subsequent to the District Court's decision in these cases, the ICC itself characterized its own role as merely having

> "issued advisory opinions to the [district] court following its requests to us for advisory opinions regarding the 'intercity' nature of the service in question."[5]

---

[4] Subsequent to the decision in that case, petitioners have sought to avoid its impact by characterizing their claims as arising under "state law". All such claims against Amtrak are, of course, barred by Section 306(c) of the Act, 45 U.S.C. § 546(c):

> "[Amtrak] shall not be subject to any State or other law pertaining to the transportation of passengers by railroad as it relates to rates, routes, or service."

[5] "Report to the President and the Congress; Amtrak – Effectiveness of the Act; by the Interstate Commerce Commission; March 15, 1974" at I, 6.

Finally, petitioners' claim that the Court of Appeals "erroneously construed the 'Basic System'" (Pet. 13) is without merit and certainly does not present any issue which warrants the attention of this Court.

Section 202 of the Act, 45 U.S.C. § 522, required the Secretary of Transportation to designate in January, 1971 a "Basic System" of intercity rail passenger service and provided that:

> "The basic system as designated by the Secretary shall become effective for the purposes of this [Act] upon the date that the final report of the Secretary is submitted to Congress *and shall not be reviewable in any court.*"[6]

Under the Act, the Basic System deals only with *intercity* rail passenger service. Section 102(4), 45 U.S.C. § 502(4), specifies that the Basic System "means the system of *intercity* rail passenger service designated by the Secretary under [Title] II . . . of this [Act]". The Secretary was restricted solely to *intercity* passenger service in performing his statutory duty of developing the Basic System.

Under Title II of the Act, the Secretary's "recommendations for the basic system" were to include, among other things, the identification of:

> ". . . all routes over which service may be provided [by Amtrak], *and the trains presently operated [by the railroads] over such routes . . .*"

This required identification of trains operating prior to May 1, 1971 over specified routes was thus an integral part of the non-reviewable Basic System.

In his Final Report on the Basic System, *the Secretary identified the Trains as intercity trains.* This identification appears at pages II-9 and II-14 of his Final Report and

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[6] Emphasis here and elsewhere is supplied.

reflects the Secretary's non-reviewable determination that the Trains were intercity, not commuter, in character.[7]

The Secretary having identified the Trains as intercity for the purposes of the Act, Section 202 thereof, 45 U.S.C. § 522, states without qualification that this identification is "not . . . reviewable in any court". The Court of Appeals therefore correctly concluded that it could not review the propriety of the Trustees' discontinuance. "The explicit words of the statute, 45 U.S.C. § 522, that the basic system 'shall not be reviewable in any court,' are clearly sufficient to indicate that Congress intended no judicial review." *Quincy College and Seminary Corporation* v. *Burlington Northern, Inc.*, 328 F. Supp. 808 at 811 (N.D. Ill. 1971), *aff'd*, 405 U.S. 906 (1972).

II. The Writ Should Be Denied in Any Event because Section 307(a) of the Act Precludes, and This Court Has Held that It Precludes, These Petitioners from Maintaining These Actions.

Although the Court of Appeals found it unnecessary to decide the issue,[8] petitioners are precluded from maintaining these actions by this Court's decision in *National Railroad Passenger Corporation* v. *National Association of*

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[7] Pages II-9 and 10 and pages II-13 through 16 of the Final Report are set out at R. App. 3a-8a. In order to make the required identification of intercity trains, it was necessary for the Secretary to develop standards by which he would omit trains providing commuter service within the definition of Section 102(5)(A) of the Act, 45 U.S.C. § 502(5)(A). These standards are contained in the Final Report:

> "For purposes of designating the Basic System this [commuter] definition was considered to mean service which covers distances of fifty miles or less, with stops at not more than five-mile intervals." Final Report at I-4 n.1.

The 200-series trains and the 600-series trains operated over distances of 90 and 103 miles, respectively.

[8] 508 F.2d at 283 n.5; P. App. 10a n.5.

Railroad Passengers, 414 U.S. 453 (1974), holding that Section 307(a) of the Act, 45 U.S.C. § 547(a), bars actions of the kind presented here when brought by parties other than the Attorney General of the United States.

Petitioners are, in substance, contending that the Trustees' May 1, 1971 discontinuance of the Trains exceeded the authority conferred on them by Section 401(a)(1) of the Act, 45 U.S.C. § 561(a)(1)[9]. Such Section authorized the Trustees to obtain relief from "all of [their] responsibilities as a common carrier of passengers by rail in intercity rail passenger service," and to discontinue all of their intercity rail passenger trains, if they should, prior to May 1, 1971, as they in fact did, enter into a contract with Amtrak "to relieve [them] of [their] entire responsibility for the provision of" such service. Such a contract was approved by the Penn Central Reorganization Court on April 27, 1971. *In re Penn Central Transportation Company, Debtor (In re Amtrak Contract)*, 329 F. Supp. 477 (E.D. Pa. 1971).

This Court's prior consideration of Section 307(a) involved an identical issue. In that case, The Central of Georgia Railway Company ("Central") had entered into a contract with Amtrak, pursuant to Section 401(a)(1) of the Act, relieving Central of its entire responsibility for the provision of intercity rail passenger service from and after May 1, 1971. The plaintiffs there contended that Central had exceeded its authority to contract under that Section because its parent, Southern Railway Company, had not itself entered into a similar contract with Amtrak.[10]

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[9] Petitioners have, in order to avoid the controlling effect of this Court's decision, latterly sought to claim that their suits are based on "state law" (*e.g.*, Pet. 18). However, petitioners' complaint filed on April 28, 1971 specifically alleged that it "is brought pursuant to 28 U.S.C. 1331, 1337 and 45 U.S.C. 501 et seq." [the Act]. (Compl., para. III).

[10] 414 U.S. at 455 n.3.

It was therefore claimed that, since the Central-Amtrak contract allegedly was not authorized by the Act, Central could not lawfully discontinue its intercity passenger trains.[11]

This Court held that the dispute then before it, which challenged the right of a railroad to take certain actions under authority of the Act, was barred by Section 307(a) and thus concluded that the plaintiffs there could not challenge Central's discontinuance of its trains:

> "Congress . . . clothed the Attorney General with the *exclusive* (except in cases involving labor agreements) authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act. . . .
>
> ". . . [W]e hold that § 307(a) provides the *exclusive* remedies for breaches of any duties or obligations imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred. . . ." 414 U.S. at 464-465.

This holding, which dismissed private claims as to alleged violations of the Act by Central, is equally applicable here. Section 307(a) precludes these petitioners from asserting that the Trustees exceeded their authority under the Act in discontinuing the Trains on May 1, 1971.

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[11] ". . . Since § 401(a)(1) authorizes only a contract for Amtrak to undertake a railroad's *entire* responsibility for intercity rail passenger service, the respondent contends that Southern cannot relieve itself of only *part* of this responsibility by allowing a subsidiary to contract with Amtrak while declining itself to do so. Accordingly, the respondent argues that Southern and Central, having entered no statutorily authorized contract with Amtrak, are prohibited . . . from discontinuing any passenger train. . . ." *Ibid.* (Emphasis by the Court).

CONCLUSION

For the foregoing reasons, respondent, National Railroad Passenger Corporation, submits that the petition of City of Philadelphia, et al., for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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RESPONDENT AMTRAK'S APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, *Debtor*	In Proceedings for the Reorganization of a Railroad Bankruptcy No. 70-347

Order No. 244
Referring Certain Matters to the Interstate Commerce Commission

AND Now, this 30th day of April, 1971, it appearing that the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, The United Transportation Union, The Commissioner of Transportation of the State of New York, and the Department of Transportation of the State of New Jersey, have filed complaints or otherwise raised issues with respect to the treatment of certain transportation facilities designated as intercity passenger trains by the National Rail Passenger Corporation (Amtrak), and with respect to the treatment of certain facilities not so designated, it is ORDERED that the above named parties shall proceed forthwith before the Interstate Commerce Commission to the end that this Court shall be advised within 90 days on the following matters:

1. Whether trains Nos. 600 through 617 between Harrisburg, Pennsylvania, and Philadelphia, Pennsylvania, trains Nos. 200 through 298 between Philadelphia, Pennsylvania, and New York, New York, and trains Nos. 22, 23, 176 and 177 within the State of New Jersey, constitute "intercity rail passenger service" within the meaning of § 102(5) of the Rail Passenger Service Act of 1970, P.L. 91-518; and to the end that this Court shall be advised within 30 days on the following matters:

2. Whether trains Nos. 922, 935, 955, 9009, 9014, 9019, 9030, and 9044 between New York, New York, and Chatham, New York, and buses Nos. 0552, 0553, 0557, 0558, 0559, 0560, and 0572 between Lancaster, Pennsylvania, and York, Pennsylvania, constitute "intercity rail passenger service" within the meaning of the same Statute.

IT IS FURTHER ORDERED that the Commission may, within 30 days, apply to this Court, upon cause shown, for an extension of time to complete the determinations required under Paragraph 2 above, no such extension to exceed an additional 30 days.

/s/ JOHN P. FULLAM

J.

II - 9

NEW YORK - WASHINGTON

I. POINTS BETWEEN WHICH INTERCITY PASSENGER TRAINS SHALL BE OPERATED· NEW YORK - WASHINGTON

II. ROUTES OVER WHICH SERVICE MAY BE PROVIDED:

The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York and Washington, is not intended to suggest that the Corporation is required to provide service to that point.

New York - Washington Segment

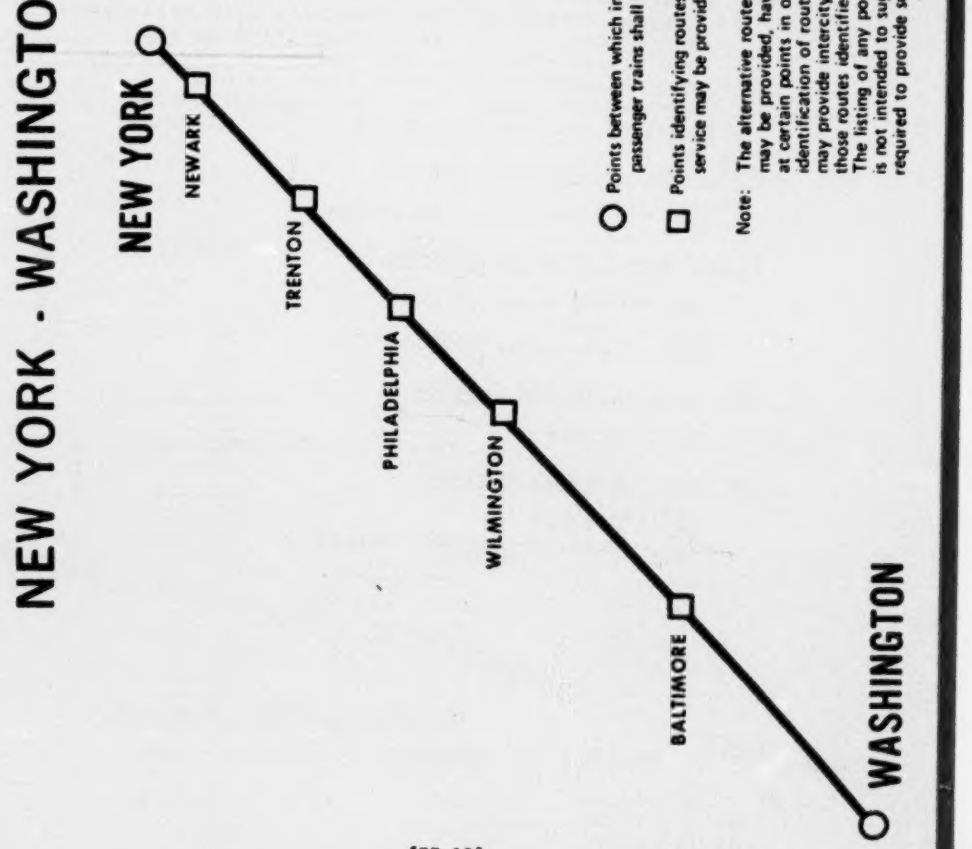
via - Newark, Trenton, Philadelphia, Wilmington, Baltimore.

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES:

Includes all trains presently operating over all or any portion of routes listed.

New York - Washington Segment

Via	Carrier	Trains
Newark, Trenton Philadelphia, Wilmington, Baltimore	PC	#25,101,103,105,107, 109,111,113,131,133, 135,137,139,143,145, 147,155,159,161,163, 165,171,173,175,177, 201,207,211,213,215, 219,221,223,225,227, 231,235,263,401.
		#54,100,102,104,106, 108,110,112,126,130, 132,140,142,144,152, 154,158,166,170,172, 174,176,202,204,206, 208,212,218,220,234, 254,256,272,282,298.



II - 13

NEW YORK - CHICAGO

I. POINTS BETWEEN WHICH INTERCITY PASSENGER TRAINS SHALL BE OPERATED: NEW YORK - CHICAGO

II. ROUTES OVER WHICH SERVICE MAY BE PROVIDED:

The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York and Chicago, is not intended to suggest that the Corporation is required to provide service to that point.

New York - Pittsburgh Segment

via - Philadelphia, Harrisburg

Pittsburgh - Chicago Segment

via - Fort Wayne
via - Deshler
via - Cleveland, Toledo

New York - Buffalo Segment

via - Albany

Buffalo - Chicago Segment

via - Detroit
via - Erie, Cleveland, Toledo

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES:

Includes all trains presently operating over all or any portion of routes listed.

New York - Pittsburgh Segment

Via	Carrier	Trains
Philadelphia, Harrisburg	PC	See "New York-Washington" for New York-Philadelphia trains #23,25,31,33,49,55, 601,603,605,607,609, 611,613,615,617,4, 16,22,24,48,50,54, 600,602,604,606,608, 610,612,614.

Pittsburgh - Chicago Segment

Via	Carrier	Trains
Fort Wayne	PC	#23,49,53,55,24, 48,50,54.
Deshler	B&O	#5,7,6,8.
Cleveland, Toledo	PC	#27,51,63,28,64,98.
	GTW	#155,159,165,156, 158,164.
	CSS&SB	#1,3,5,9,311,13,315, 17,319,21,27,29,31, 33,35,8,310,10,12, 16,316,20,320,24, 326,28,328,34,334, 36,40,340,42.

New York - Buffalo Segment

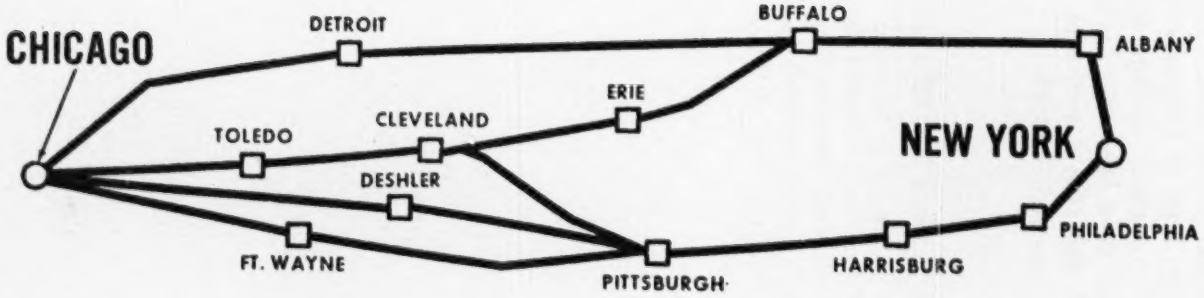
Via	Carrier	Trains
Albany	PC	#61,63,71,73,75,81, 83,85,62,64,70,72, 74,80,82,84.

III. TRAINS PRESENTLY OPERATED OVER SUCH ROUTES: (Cont'd)

Buffalo - Chicago Segment

Via	Carrier	Trains
Detroit	PC	#17,351,355,14, 52,356.
	GTW	#155,159,165,169, 156,158,164,168.
	C&O	#11,15,12,14.
Erie, Cleveland, Toledo	PC	#21,51,63,28,64,98.
	GTW	#155,159,165,156, 158,164.
	CSS&SB	#1,3,5,9,311,13,315, 17,319,21,27,29,31, 33,35,8,310,10,12, 16,316,20,320,24, 326,28,328,34,334, 36,40,340,42.

NEW YORK - CHICAGO



[II-16]

○ Points between which intercity passenger trains shall be operated.

□ Points identifying routes over which service may be provided.

Note: The alternative routes shown, over which service may be provided, have been divided into segments at certain points in order to facilitate the clear identification of route options. The Corporation may provide intercity rail passenger service over those routes identified or any combination thereof. The listing of any point, other than New York-Chicago is not intended to suggest that the Corporation is required to provide service to that point.

R. App 8a

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court, copies of the foregoing Brief of Respondent, National Railroad Passenger Corporation, in Opposition to Petition for Writ of Certiorari have been sent by United States mail, postage prepaid, this 20th day of May, 1975 to counsel identified on the attached Schedule A.

/s/ PATRICK F. MCCARTAN

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Schedule A

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No. 74-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

CITY OF PHILADELPHIA, ET AL.,
Petitioners

v.

GEORGE P. BAKER, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS, ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, TRUSTEES OF PENN CENTRAL TRANSPORTATION COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Trustees of Penn Central Transportation Company respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, *City of Philadelphia v. Baker* is reported at 508 F.2d 279 and is reproduced as Appendix A to the petition (App. 1a-14a).

QUESTIONS PRESENTED

1. Was the Court of Appeals right in deciding that a designation by the Secretary of Transportation, pursuant to Section 202 of the Rail Passenger Service Act (RPSA), that a train is in intercity service is not reviewable in any court?

2. Do petitioners have the right to challenge discontinuance of trains by the Penn Central Trustees pursuant to RPSA when that Act (Section 307(a)) provides that only the Attorney General of the United States is authorized to challenge such discontinuances?

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, Section 307(a) of the RPSA is also pertinent. That section provides:

> (a) If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this Act, obstructs or refuses, fails, or neglects to discharge its duties and responsibilities under this Act, or threatens any such violation, obstruction, interference, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall upon petition of the Attorney General of the United States, or in any case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat.

STATEMENT OF THE CASE

The joint Petition of the City of Philadelphia, Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission and United Transportation Union asks this Court to review train discontinuances by the Penn Central Trustees (Trustees) pursuant to RPSA. The Reorganization Court, by its order No. 238, entered on April 27, 1971, authorized the Trustees to enter into a contract with the National Railroad Passenger Corporation (Amtrak). *In re Penn Central Transportation Company*, 329 F. Supp. 477 (E.D. Pa. 1971). Having entered into a contract with Amtrak under Section 401(a)(1) of RPSA, the Trustees were required to give notice of their intention, on their own behalf, to discontinue all intercity rail passenger service both in accordance with the contract and under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1).

Included in the Trustees' notice of discontinuance were all trains which had been designated by the Secretary of Transportation to be included in Amtrak's basic intercity rail passenger system.

Several persons including the petitioners here, asked the Reorganization Court to find that the Trustees had violated RPSA in attempting to discontinue a group of trains which it was alleged were commuter rather than intercity in nature.

After consideration of that petition, the Reorganization Court on April 30, 1971 by its Order No. 244 required the petitioners to submit their claims to the Interstate Commerce Commission so that the Court would be advised as to whether in the Commission's opinion, the 200 series trains between New York and Philadelphia and the 600 series trains between Harrisburg and Philadelphia, Pa.—which are the subject of the Petition for Certiorari to this

Court—were operated in intercity rail passenger service within the meaning of RSPA. The Commission in *Penn Central Transportation Company—Status of Passenger Service (Harrisburg-Philadelphia, Pennsylvania)*, 338 I.C.C. 621 (1971) and *Penn Central Transportation Company—Status of Passenger Service (Philadelphia, Pa.-New York, N.Y.)*, 338 I.C.C. 690 (1971), concluded that the trains were not in intercity rail passenger service within the meaning of RSPA.

Petitioners thereafter moved the Reorganization Court to convene a three-Judge District Court to enforce the orders of the Commission. The Trustees and Amtrak moved to dismiss the complaints. The Reorganization Court granted the motions to dismiss and the United States Court of Appeals for the Third Circuit, without dissent, affirmed the orders of the Reorganization Court. The Court of Appeals held that the Secretary of Transportation in his report to the Congress pursuant to Section 201 of the RPSA, had designated both the 600 series trains between Philadelphia and Harrisburg, and the New York-Philadelphia 200 series trains as intercity. The Court further found that the Congress, by Section 202 of the RPSA, had intended that the report of the Secretary was to be subject to review only by the Congress and not by the courts.

The Court of Appeals concluded that it was unnecessary to consider the contention that *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) barred relief.

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Involves No Important or Recurring Question of Law

There is no reason for this Court to review the decision of the Court of Appeals since it deals with a statutory interpretation involving a unique factual situation which will not surface in the future. All of the issues raised by the petitioners here relate to preliminary procedures which were established so that there would be an orderly reduction in intercity rail passenger service and the establishment of a national rail passenger system by Amtrak. The report of the Secretary of Transportation on the intercity rail passenger system to be operated by Amtrak was released about January 28, 1971.

There were a few Court challenges of this legislation and the changes in passenger train service under it. All of the litigation involving the discontinuance of service by railroads, except this Petition, has been concluded. Therefore, petitioners cannot establish that the Court's granting of this petition would affect any existing or future litigation.

The decision of the Court of Appeals is not in conflict with any decisions of this Court nor with any decision in another Circuit. None of the cases referred to by petitioners involved a determination of the Secretary of Transportation pursuant to Section 201 of the RPSA. The issue before the Court of Appeals was unique and local and not involved in any of the other cases.

The petitioners' contention that the decision of the Court of Appeals usurps the primary jurisdiction of the Interstate Commerce Commission is without merit. One of the Commission proceedings referred to involved a discontinuance of commuter service pursuant to Section 13(a)

of the Interstate Commerce Act, 49 U.S.C. § 13(a) and did not concern the RPSA at all. *See Penn Central Transp. Co. Discon. or Change in Serv.*, 338 I.C.C. 318 (1971).

The other proceedings before the Commission were the result of referrals by District Courts for advisory opinions and were not based upon the Commission's exclusive primary jurisdiction. *See Chicago & E.I.R.R. Discontinuance of Trains*, 338 I.C.C. 714 (1971); *Kennedy v. Baltimore & O.R.R.*, 342 I.C.C. 19 (1972), 342 I.C.C. 778 (1973); *Penn Central Transp. Co.—Status of Passenger Service*, 338 I.C.C. 660 (1971); *Penn Central Transp. Co.—Status of Passenger Service (Phila., Pa.-Harrisburg, Pa.)*, 338 I.C.C. 621 (1971); and *Penn Central Transp. Co.—Status of Passenger Service (Phila., Pa.-New York, N.Y.)*, 338 I.C.C. 690 (1971).

Petitioners have argued that the Court of Appeals has misconstrued Section 202 of RPSA. Under this Section the Secretary of Transportation was to prepare a report and recommendations for the basic system of intercity rail passenger service. The trains which are the subject of this Petition were all identified as intercity trains in the final report submitted to Congress by the Secretary on January 28, 1971. The Secretary in establishing the points between which intercity passenger trains shall be operated was required by Section 201 of the RPSA to ". . . indentify all routes over which service may be provided, and the trains presently operated over such routes . . .". In Part II of his final report the Secretary listed all of the 200 series trains as being operated over a portion of the New York-Washington segment of the basic Amtrak system. Since this Basic System was designated by the Secretary in accordance with Sections 201 and 202 of the RPSA, it was limited to intercity passenger service, and therefore, only included intercity passenger trains. None of the local

trains service between New York City and points in New Jersey and none of the commuter train service running between Trenton, New Jersey and Philadelphia, Pennsylvania, which is operated over this same Washington to New York line and on the same tracks is listed in the Secretary's Report.

A similar procedure was followed by the Secretary in establishing the New York-Chicago and New York-Kansas City routes. In identifying intercity trains operating over these lines the Secretary included each of the 600 series trains operating between Philadelphia and Harrisburg. But the Philadelphia commutation service operating between Trenton and Philadelphia and between Paoli, Pennsylvania, and Philadelphia was not included in the Report.

Since the trains involved in this appeal were designated as intercity passenger trains by the Secretary, the Trustees were required to discontinue their operation by RPSA. Further, having entered into a contract with Amtrak pursuant to Section 401(a)(1) of the RPSA, the Trustees were prohibited from competing with Amtrak by Section 401(c) of that Act. Thus, the Trustees, by the Amtrak agreement, were required to discontinue all of the 200 and 600 series trains operating over the lines of railroad on which Amtrak began providing service on May 1, 1971.

The Court of Appeals was right in concluding that the final report of the Secretary is not reviewable in any court. The Congress' intent as evidenced in RPSA was that only the Congress should review the basic system and that judicial review was precluded.

II. The Trustees Discontinuance of Passenger Service Did Not Violate Petitioners' Rights

Petitioners have contended that their States Rights are being violated by the decision of the Court of Appeals.

Their purpose is to circumvent the decision of this Court in *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers,* 414 U.S. 453 (1974). There it was held that Section 307(a) of RPSA authorized only the Attorney General of the United States to maintain an action against a railroad for non-compliance with the Act.

Although the Court of Appeals did not reach the issue of Petitioners standing to maintain their action, it is plain that the suit was not authorized by Section 307(a) of the RPSA and is contrary to the Decision of this Court in *National R.R. Passenger Corp. v. National Ass'n. of R.R. Passengers.*

Since the trains in question were discontinued in accordance with the provisions of the RPSA, Section 307(a), this Court's ruling prohibits Petitioners or any other private parties from challenging such discontinuance.

The decision below is not inconsistent with this Court's decision and therefore, there is no justification for granting the Writ.

CONCLUSION

It is respectfully submitted that Petitioners have failed to establish that the Court of Appeals erred in its consideration of the provision of the Rail Passenger Service Act, or that any important recurring issue of law is involved. Therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Certificate of Service

Pursuant to Rule 33 of the United States, copies of the Brief of Respondents, Trustees of Penn Central Transportation Company, in Opposition to Petition for Writ of Certiorari have been sent this 22nd day of May, 1975, by United States mail, postage prepaid, to counsel listed below.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1331

CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

GEORGE P. BAKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-10a) is reported at 508 F.2d 279. The opinion of the district court (Pet. App. D, 24a-33a) is reported at 370 F. Supp. 22.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A, 11a-14a) was entered on January 22, 1975. The petition for a writ of certiorari was filed on April 22, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioners have also reproduced an earlier opinion of the district court (Pet. App. C, 19a-23a) referring certain matters to the Interstate Commerce Commission and the two resulting opinions of the Commission (Pet. App. E, 34a-72a; Pet App. F, 73a-96a). See Pet. 1-2.

QUESTIONS PRESENTED

1. Whether Section 202 of the Rail Passenger Service Act of 1970 (the "Act"), 45 U.S.C. 522, precludes petitioners from suing Amtrak to surrender part of its service because petitioners seek judicial review of the basic system of intercity rail passenger transportation reported to Congress by the Secretary of Transportation, whose designation is made non-reviewable by Section 202.

2. Whether, in view of Section 307(a) of the Act, 45 U.S.C. 547(a), parties other than the Attorney General of the United States may sue to compel Amtrak to surrender part of its service on the ground that Amtrak is operating such service in violation of the Act.

STATEMENT

Since May 1, 1971, respondent[2] National Railroad Passenger Corporation ("Amtrak") has operated a series of trains between Harrisburg and Philadelphia, Pennsylvania (the 600 series) and between Philadelphia and New York City (the 200 series), subject to the provisions of the Rail Passenger Service Act of 1970 (the "Act"), 84 Stat. 1327, as amended, 45 U.S.C. 501, *et seq.* Prior to that time, these trains were operated by the Trustees of the Penn Central Transportation Company (the "Trustees"), subject to regulation under state law. In April 1971, the Trustees entered into a contract with Amtrak under Section 401 of the Act, 45 U.S.C. 561, for Amtrak to take over the service in question on May 1, 1971.

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[2]Petitioners are the City of Philadelphia, the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission and the United Transportation Union; respondents are the Trustees of the Property of the Penn Central Transportation Company, the National Railroad Passenger Corporation ("Amtrak") and the United States.

Shortly before the effective date of the contract, petitioners brought an action in the United States District Court for the Eastern District of Pennsylvania[3] claiming that the Trustees' discontinuance of the 200 and 600 series trains would violate the Act because these were commuter, not intercity, trains and therefore could not be discontinued under the Act (Pet. App. 5a-6a, 25a).

On April 30, 1971, the district court entered Order No. 244 in the reorganization proceedings, referring the question of the intercity or commuter status of the trains to the Interstate Commerce Commission, without, however, specifying the grounds for the referral. The court also directed that the Trustees' intercity rail passenger service including the 200 and 600 series trains be discontinued, but that the Trustees should resume the operation of these trains if, before the Commission's determination, the trains were discontinued by Amtrak (Order No. 245) (Pet. App. 6a).

In June and July, 1971, the Commission determined that the 200 and 600 series trains were not "intercity rail passenger service" within the meaning of Section 102(5) of the Act, but were commuter service. Finance Docket No. 26632, 338 I.C.C. 621 (the 600 series trains); Finance Docket No. 26634, 338 I.C.C. 690 (the 200 series trains) (Pet. App. 34a-72a, 73a-96a). The Commission issued no orders; its opinions were rendered on an advisory basis pursuant to the request of the reorganization court (Pet. App. 35a, 54a, 74a, 86a).

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[3]This district court (the reorganization court), which was supervising the reorganization of the Penn Central under Section 77 of the Bankruptcy Act, 47 Stat. 1474, as amended, 11 U.S.C. 205, had previously entered an order enjoining petitioners, among others, from instituting or maintaining any litigation affecting the discontinuance of Penn Central's passenger trains in any court other than the Eastern District of Pennsylvania. See *In re Penn Central Transportation Co.*, 329 F. Supp. 387 (E.D. Pa.), affirmed, 446 F.2d 1109 (C.A. 3).

Petitioners then requested the reorganization court to direct the Trustees to resume operation of the trains; petitioners also filed an additional plenary action in the district court, seeking judicial enforcement of the two Commission decisions and a declaration that the Trustees may not be relieved of the responsibility of the disputed service. Petitioners later requested the convening of a three-judge court in both plenary actions, pursuant to 28 U.S.C. 2325 (Pet. App. 6a-7a).

The district court[4] granted respondents' motions to dismiss the plenary actions, denied petitioners' motions to convene a three-judge court, and refused petitioners the relief which they sought in the reorganization proceedings. The court held that a three-judge court was not required in the plenary actions because the Commission's reports were not "orders" within the meaning of 28 U.S.C. 2325. The court further held that the 200 series and 600 series trains were either part of the initial "basic system" of intercity passenger service under the Rail Passenger Service Act or had been made part of the basic system by operation under Amtrak contracts. The court held that Section 202 of the Act, 45 U.S.C. 522, made unreviewable the selection of trains for the basic system by the Secretary of Transportation and that Section 307, 45 U.S.C. 547, as interpreted by this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, precluded judicial review in a suit not brought by the Attorney General (Pet. App. D, 26a-29a, 33a).

The court of appeals affirmed (Pet. App. A, 1a-10a) on the ground that the trains constituted part of the initial basic system submitted by the Secretary of Transportation to Congress and that his decision to include them is specifically made unreviewable by Section 202 of the Act, 45 U.S.C. 522.

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[4] *In re Penn Central Transportation Co.*, 370 F. Supp. 22 (E.D. Pa.) (Pet. App. D, 24a-33a).

ARGUMENT

There is no reason for this Court to review the judgment of the court of appeals. This litigation dates from 1971, when Amtrak first began operating a nationwide intercity rail passenger network. So far as we are aware, it is the last pending case involving a challenge to the discontinuance by a railroad of trains pursuant to its contract with Amtrak under 45 U.S.C. 561 and future cases are unlikely to arise.[5]

In any event, the decision below is correct. The series 200 and 600 trains were included in the Secretary of Transportation's 1971 final report submitted to Congress (Pet. App. A, 9a; 45 U.S.C. 521). Both the district court and the court of appeals found that the rail service in question here constitutes part of the "basic system"of Amtrak. Congress explicitly entrusted the composition of this basic system to the Secretary of Transportation and exempted his decision from judicial review. 45 U.S.C. 522. The court of appeals thus correctly upheld the dismissal of petitioners' suit to have the rail service transferred back to the Penn Central Trustees.

Moreover, petitioners' argument essentially is that, under the Rail Passenger Service Act, Amtrak has no authority to operate the trains because these (or some of them) are, in petitioners' view, properly classified as commuter trains. This amounts to a claim that the Rail Passenger Service Act was violated when these trains were made

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[5]Amtrak's operations are reviewed and scrutinized by Congress on a regular basis in connection with the reports and legislative recommendations submitted by Amtrak to Congress pursuant to Section 308 of the Act, 45 U.S.C. 548. In certain instances, Congress has specified to Amtrak what additional service Amtrak may operate, *e.g.*, 45 U.S.C. (Supp. III) 563(d) and 601(b), or what service it may discontinue, *e.g.*, 45 U.S.C. (Supp. III) 564(b)(1) and (2).

part of the basic system. But only last Term, this Court held in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, that Section 307(a) of the Act, 45 U.S.C. 547(a), prohibits a suit against Amtrak or a private railroad for violation of the Act unless the suit is brought by the Attorney General or involves a labor agreement. 414 U.S. at 457, 464.

In order to avoid this prohibition, petitioners argue (Pet. 16-18) that their actions are not brought under the Rail Passenger Service Act but under state law. However, Paragraph III of the complaint in *City of Philadelphia* v. *Baker* states explicitly "[t]his action is brought pursuant to * * * 45 U.S.C. 501 *et seq.* * * *" and the prayer of the complaint seeks a declaration, in accordance with the advisory opinions of the Commission, that Amtrak is operating the trains in question in violation of Section 102(5) of the Act, 45 U.S.C. 502(5). Paragraph IV of the complaint in *Commonwealth of Pennsylvania* v. *Baker* links that complaint to *City of Philadelphia* v. *Baker*. In short, there can be no doubt that the gravamen of petitioners' pleadings is that Amtrak's operation of the trains in question here is in violation of the Act. Compare 414 U.S. at 454-455. The congressional scheme for the rehabilitation and restoration of intercity rail passenger service embodied in the Act, as interpreted by this Court in *Railroad Passengers, supra*, does not permit such complaints except by the Attorney General. The district court there-

fore properly dismissed petitioners' complaints on this ground, which the court of appeals found unnecessary to reach (Pet. App. 10a n.5).[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1975.

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[6]Petitioners contend (Pet. 9-11) that the decision of the court of appeals conflicts with the decision of the District of Columbia Circuit in *Potomac Passengers Association* v. *Chesapeake and Ohio Ry. Co.*, 475 F.2d 325 (1973), and two district court decisions in Illinois, *Illinois Commerce Commission* v. *United States*, 346 F. Supp. 910 (S.D. Ill., 1972), and *People of State of Illinois* v. *United States*, 371 F. Supp. 1136 (N.D. Ill., 1973), which permitted suits by parties other than the Attorney General to contest discontinuance of trains as violative of the Rail Passenger Service Act. All of these decisions were rendered before this Court's decision in *Railroad Passengers, supra*. Moreover, each is concerned with suits by private litigants to prevent railroads from discontinuing services *not* taken over by Amtrak. The present litigation to compel surrender of service which Amtrak does operate has a far more direct impact upon Amtrak's ability "to fashion and operate a viable system of intercity passenger service" (Pet. App. 27a-28a). There is thus no conflict with those decisions, which are in any event of doubtful authority in light of this Court's decision in *Railroad Passengers*.

No. 74-1331

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

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CITY OF PHILADELPHIA, *et al.*, *Petitioners*,

v.

GEORGE F. BAKER, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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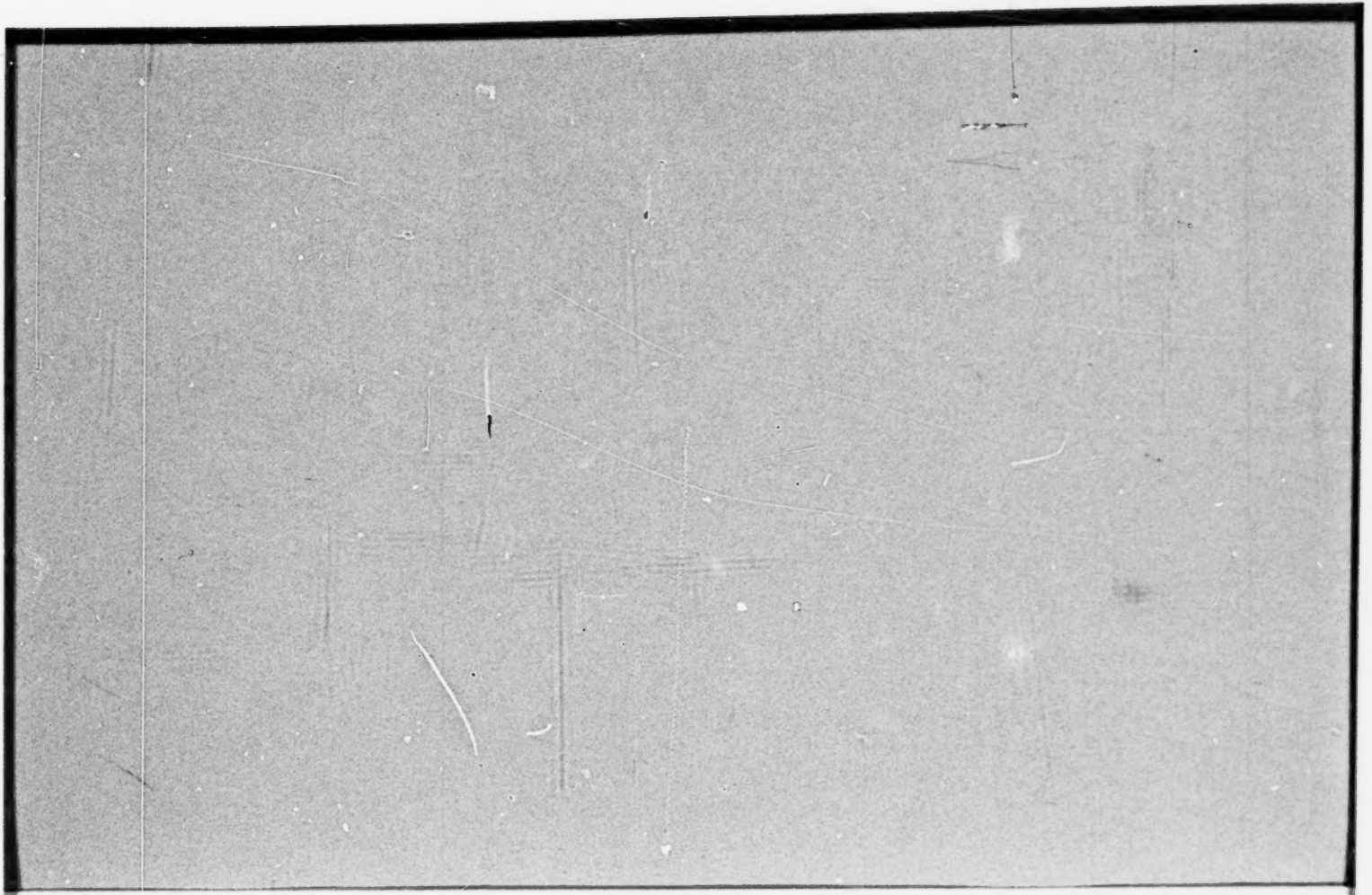

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REPLY BRIEF

Petitioners[1] make this reply in answer to matters first raised by the briefs in opposition.[2] In particular, we wish to correct the apparent misunderstanding of the Solicitor General concerning other pending proceedings, and the nature of the action below.

1. *Other Pending Cases.* Respondents infer that this case, involving 44 commuter passenger trains serving the Philadelphia, Pa. area, is the final situation involving the

[1] Commonwealth of Pennsylvania, City of Philadelphia, Pennsylvania Public Utility Commission, and United Transportation Union.

[2] United States of America, Penn Central Transportation Company, and National Railroad Passenger Corp.

1971 discontinuances by Penn Central and other railroads.[3] (USA Br., p. 5; Penn Central Br., p. 5; Amtrak Br., pp. 6-7). This is incorrect.

In actual fact, the question of the determination of, and the reviewability over, the commuter-versus-intercity character of passenger trains, is central to pending cases involving commuter train service at Washington, D.C. and at Chicago, Ill. These cases are:

A. No. 73-2015 (D.C. Cir.) *Potomac Passengers Assn. v. Baltimore & Ohio R. Co.*, reported below at 363 F. Supp. 39 (D.D.C.) and 342 I.C.C. 778.

B. No. 72 S 114 (N.D. Ind.). *City of South Bend v. United States*, reported below at 342 I.C.C. 154, 179-80.

Moreover, since the basis of the decision below was jurisdictional in nature, i.e., that the U.S. Secretary of Transportation has exclusive and non-reviewable authority to determine the intercity-commuter character of a train, attempts may be made to reopen some judgments.[4]

2. *State Cause of Action.* The U.S.A. contends that the gravamen of the action below is to challenge Amtrak's operation of the trains as in violation of the Amtrak Act. This is incorrect. Our complaint is to enjoin Penn Central's discontinuance as in violation of State law. The original complaint, attached hereto, was filed in the State court, on April 7, 1971, subsequent to Penn Central's post-

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[3] There are no discontinuances by Amtrak involved in this case.

[4] For example, the Chicago, Ill.-Clinton, Ia. trains, ruled intercity by the I.C.C., were excluded from the January, 1971 report of the U.S. Secretary of Transportation. *People of the State of Illinois v. United States*, 371 F. Supp. 1136 (N.D. Ill. 1973).

ing of its discontinuance notices on March 31, 1971. A few days thereafter, the Pennsylvania interests were enjoined from prosecuting such actions outside the Penn Central reorganization court. 329 F. Supp. 387, aff'd 446 F.2d 1109; see also: 457 F.2d 381, 387.

In view of the injunction, we thereupon filed a complaint in the federal court, specifically alleging a violation of state laws, and added thereto an allegation of jurisdiction also under the Amtrak Act.[5] This is in accordance with procedures suggested by the U.S. Court of Appeals for the D.C. Circuit in litigation involving the commuter-versus-intercity character of train service. *Potomac Passengers Assn. v. Chesapeake & Ohio R. Co.*, 475 F.2d 325, 340-44 (D.C. Cir. 1973). The claims in *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974), were predicated

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[5] This complaint, filed April 28, 1971, did not pray for declaratory relief, as suggested by the Solicitor General. (U.S.A. Br., p. 6) It expanded the relief sought so as to embrace additional trains, as well as bus service.

solely upon an asserted violation of the Amtrak Act, and not State law as here.

Respectfully submitted,

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June, 1975

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, CITY OF PHILADELPHIA, and UNITED TRANSPORTATION UNION,

Plaintiffs

v.

PENN CENTRAL TRANSPORTATION COMPANY,

Defendant

: No. 277 C.D., 1971

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COMPLAINT IN EQUITY

TO THE HONORABLE PRESIDENT JUDGE AND JUDGES OF THE SAID COURT:

AND NOW, this 7th day of April, 1971, come the Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, City of Philadelphia, and United Transportation Union, by counsel, and complain as follows:

1. The defendant is Penn Central Transportation Company, a railroad with its principal office at Six Penn Center Plaza, Philadelphia, Pennsylvania, and subject to the jurisdiction of Pennsylvania Public Utility Commission under the Pennsylvania Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 P.S. 1101, et seq.

2. Defendant presently operates 17 trains between Harrisburg, Pennsylvania and Philadelphia, Pennsylvania, known as the 600 Series trains and bearing the numbers 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615 and 617.

3. On March 31, 1971, defendant, by W. H. Moore, President and Chief Executive Officer of Penn Central Transportation Company, posted public notices purportedly in

accordance with the requirements of Section 401(a)(1) of the Rail Passenger Service Act of 1970, P.L. 91-518, 84 Stat. 1327, 45 U.S.C.A. §561(a)(1), announcing that it will terminate its responsibility for the operation of the aforesaid 600 Series passenger trains effective May 1, 1971, and asserting that said publication is the official notice of the Discontinuance of Service under Section 13(a) of the Interstate Commerce Act, and further asserting that the said trains "are intercity and entitled to be discontinued by virtue of Section 401(a)(1) of the Rail Passenger Service Act of 1970".

4. The aforesaid 600 Series trains are not "intercity rail passenger service" trains as defined by Section 102(5) of the Rail Passenger Service Act of 1970 but are, in fact, "commuter" or "short-haul" trains as defined by Section 102(5) of the said Rail Passenger Act of 1970 and the said 600 Series trains, accordingly, are not entitled to be discontinued under the provisions of the Rail Passenger Service Act of 1970 but are now and will continue after May 1, 1971 to be under the jurisdiction of the Pennsylvania Public Utility Commission.

5. Discontinuance of service on May 1, 1971, by the aforesaid 600 Series passenger trains as proposed and announced by defendant without the approval of the Pennsylvania Public Utility Commission first had and obtained would violate the Pennsylvania Public Utility Law.

WHEREFORE, pursuant to Section 903 of the Pennsylvania Public Utility Law, 66 P.S. §1343, as amended, Pennsylvania Public Utility Commission and the other plaintiffs named herein pray your Honorable Court to enter an order to restrain defendant from violating the Pennsylvania Public Utility Law as aforesaid and to enforce obedience thereto by preliminary injunction and after hearing by permanent injunction.

AND, they will ever pray, etc.

Respectfully submitted,

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